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UNITED STATES REPORTS

VOLUME 150

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1893

J. C. BANCROFT DAVIS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief Justice.
STEPHEN JOHNSON FIELD, Associate Justice.
JOHN MARSHALL HARLAN, Associate Justice.
HORACE GRAY, Associate Justice.
DAVID JOSIAH BREWER, Associate Justice.
HENRY BILLINGS BROWN, Associate Justice.
GEORGE SHIRAS, Jr., Associate Justice.
HOWELL EDMONDS JACKSON, Associate Justice.
——— ——— Associate Justice.[1]

RICHARD OLNEY, Attorney General.
LAWRENCE MAXWELL, Jr., Solicitor General.[2]
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

---

[1] Mr. Justice Blatchford died at Newport, Rhode Island, on the 7th day of July, 1893.

[2] Mr. Aldrich having resigned, Mr. Maxwell was appointed in his place. His commission is dated April 6, 1893. He qualified for office May 29, 1893.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1893.

UNITED STATES *v.* DENVER AND RIO GRANDE RAILWAY COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 3. Argued October 10, 1893. — Decided October 23, 1893.

After the expiration of the time limited by the act of June 8, 1872, 17 Stat. 339, c. 354, for the completion of its road to Santa Fé, if not before that time, the Denver and Rio Grande Railway Company was entitled to claim the benefit of the act of March 3, 1875, 18 Stat. 482, c. 151, upon complying with its conditions.

The act of March 3, 1875, 18 Stat. 482, c. 151, granting a right of way to railroads through the public lands, and authorizing them to take therefrom timber or other materials necessary for the construction of their roadways, station buildings, depots, machine-shops, sidetracks, turnouts, water stations, etc., permits a railway company to use the timber or material so taken on portions of its line remote from the place from which it is taken.

In its ordinary acceptation and enlarged sense, the term "railroad" includes all structures which are necessary and essential to its operation.

While it is well settled that public grants are to be construed strictly as against the grantees, they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given.

General legislation, offering advantages in the public lands to individuals or corporations as an inducement to the accomplishment of enterprises of a *quasi* public character through undeveloped public domain should receive a more liberal construction than is given to an ordinary private grant.

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Opinion of the Court.

It is not decided that the act of March 3, 1875, gave a right to take timber from the public domain for making rolling stock; nor what structure, if any, not enumerated in that act would constitute necessary, essential, or constituent parts of a railroad.

THE case is stated in the opinion.

Mr. Solicitor General, with whom was *Mr. William A. Maury* on the brief, for plaintiffs in error cited: *Railway Co.* v. *Alling*, 99 U. S. 463; *United States* v. *Burlington & Missouri River Railroad*, 98 U. S. 334; *United States* v. *Chaplin*, 31 Fed. Rep. 890; *Leavenworth, Lawrence &c. Railway* v. *United States*, 92 U. S. 733; *Slidell* v. *Grandjean*, 111 U. S. 412; *Dubuque & Pacific Railroad* v. *Litchfield*, 23 How. 66; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420; *Providence Bank* v. *Billings*, 4 Pet. 514; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659; *Oregon Railway & Navigation Co.* v. *Oregonian Railway Co.*, 130 U. S. 1; *Portland, Saco & Portsmouth Railroad* v. *Saco*, 60 Maine, 196; *Stevens* v. *Erie Railway*, 6 C. E. Green, (21 N. J. Eq.,) 259.

Mr. Edward O. Wolcott, (with whom was *Mr. Joel F. Vaile* on the brief,) for defendant in error, cited: *United States* v. *Denver & Rio Grande Railway*, 31 Fed. Rep. 886; *Edwards* v. *Darby*, 12 Wheat. 206; *Johnson* v. *Towsley*, 13 Wall. 72; *United States* v. *Moore*, 95 U. S. 760; *Brown* v. *United States*, 113 U. S. 568; *United States* v. *Bank of North Carolina*, 6 Pet. 26; *United States* v. *Chaplin*, 31 Fed. Rep. 890; *Henderson's Lessee* v. *Long*, Cooke, (Tenn.,) 128; *Courtright* v. *Cedar Rapids &c. Railroad*, 35 Iowa, 386; *United States* v. *Burlington &c. Railroad*, 98 U. S. 334; *Cother* v. *Midland Railway*, 2 Phillips Ch. 469; *Lake Superior &c. Railroad* v. *United States*, 93 U. S. 442; *Baltimore* v. *Baltimore & Ohio Railroad*, 21 Maryland, 50; *Missouri, Kansas &c. Railroad* v. *Kansas Pacific Railroad*, 97 U. S. 491.

MR. JUSTICE JACKSON delivered the opinion of the court.

The record in this case presents for our consideration and determination the following questions: First, is the defendant,

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a railway company, duly chartered and organized in 1870 under the laws of the Territory of Colorado, for the purpose of locating, constructing, and operating an extensive system of railway and telegraph lines, entitled to the benefits of the act of Congress approved March 3, 1875, 18 Stat. 482, c. 152, entitled "An act granting to railroads the right of way through the public lands of the United States;" and, second, if so entitled, is the defendant authorized or permitted, under a proper construction of said act, to take from the public lands adjacent to the line of the railroad, timber or other material necessary for the construction of its roadway, station buildings, depots, machine shops, side tracks, turnouts, water stations, &c., and use the same on portions of its line remote from the place from which such timber or material may be taken; or does the act limit the railroad company to timber or other material found in the vicinity of the place where the work of construction is going on?

These questions, constituting the matters in controversy between the parties, arise in this way: The plaintiffs in error, who were the plaintiffs below, brought their suit against the defendant in the District Court of the United States for the District of Colorado, to recover the value of timber alleged to have been taken by the defendant from the public domain between October 1, 1882, and November 1, 1883. The defendant, by its answer, interposed a general denial of the allegations of the complaint, and for a further defence justified the taking of the timber under the special act of Congress approved June 8, 1872, 17 Stat. 339, c. 354, and under the general act of March 3, 1875. The case was tried upon the following agreed statement of facts:

"1. The timber sued for in said action was cut by William A. Eckerly & Company, as agents for the Denver and Rio Grande Railway Company, and delivered to said railway company.

"2. That the attached statement correctly shows the kinds and amounts of timber so cut and delivered, and also shows the time of cutting, the purposes for which it was cut and used, and the prices paid for cutting and delivering the same.

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"3. The said timber was cut in Montrose County, Colorado, and near the town of Montrose, and upon public, unoccupied, and unentered lands of the United States.

"4. That the lands from which the timber was cut were along and near and adjacent to the line of railway of said company.

"5. That the portion of the line of railway through said county of Montrose, and in the vicinity of said town of Montrose, was not constructed or completed until after June 8, 1882, and that on June 8, 1882, said line of railway was only constructed and completed as far westward as Cebolla, in Gunnison County, Colorado.

"6. That said company had not completed its line of railway to Santa Fé on June 8, 1882, nor has it ever so completed it.

"7. That of the timber cut as aforesaid, a part was used on portions of the line of railway out to Grand Junction, constructed and completed after June 8, 1882, and for the purposes of construction of railway, erection of section and depot houses, snow-sheds, fences, &c.

"And a part was shipped by the Denver and Rio Grande Railway for similar purposes to the Denver and Rio Grande Western Railway, to be used in the Territory of Utah, as shown in the attached statement, and $1000 worth was used for repairs on portions of road completed prior to June 8, 1882.

"8. That as to all of its line of railway constructed after June 8, 1882, the said company strictly complied with all the requirements of the act of Congress approved March 3d, 1875, entitled, 'An act granting railroads the right of way through the public lands of the United States.'"

On this agreed statement of facts there were submitted to the court for decision several legal propositions and questions, which were not, however, separately considered and passed upon, and need not be here specially noticed. The case made by the facts agreed upon was intended to be a test case to obtain a definite and positive adjudication by the court of the rights of the railway company with regard to cutting timber

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from public lands under the provisions of the two acts which have been referred to.

The District Court entered judgment for the plaintiffs for $24,926.25, the agreed value of the timber taken. From this judgment the defendant took its writ of error to the Circuit Court of the United States for the District of Colorado, which modified the judgment of the District Court by charging the defendant first, with the sum of $1000, as the value of the timber used for repairs on that portion of the road east of Cebolla, Colorado, which had been completed prior to June 8, 1882; and for the further sum of $1229.45, as the value of the timber shipped by the defendant to the Denver and Rio Grande Western Railway Company to be used in the Territory of Utah; but as to the rest of the timber used on portions of the road west of Montrose, out to Grand Junction, for the purpose of constructing the defendant's railway, erecting bridges, section houses, depots, bunk houses, stock yards, water tanks, &c., held that the defendant was not liable therefor, and to that extent reversed the judgment of the District Court. The plaintiffs prosecute the present writ of error to review and reverse this judgment of the Circuit Court. The defendant has sued out no cross writ of error, and concedes its liability for the timber with which it has been charged by the judgment of the Circuit Court.

If the defendant is not entitled to the benefits of the act of March 3, 1875, or if that act, properly construed, does not permit or allow the defendant to use timber taken from adjacent lands except for the construction of adjacent portions of its line of road and structures connected therewith, then the judgment of the Circuit Court is erroneous. If, however, the defendant can rightfully claim the benefits of the act of March 3, 1875, and if that act authorizes it to take from the public lands adjacent to its line of road timber necessary for the construction of its railway, and use the same at points distant from the place at which the timber was taken, then the judgment below should be affirmed.

By the act of Congress approved June 8, 1872, "the right of way over the public domain, one hundred feet in width on

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each side of the track, together with such public lands adjacent thereto as may be needed for depots, shops, and other buildings for railway purposes, and for yard room and side tracks, not exceeding twenty acres at any one station, and not more than one station in every ten miles [of the road] and the right to take from the public lands adjacent thereto stone, timber, earth, water, and other material required for the construction and repair of its railway and telegraphic line," was granted and confirmed unto the defendant in error, its successors, and assigns. Attached to this grant was a proviso "that said company shall complete its railway to a point on the Rio Grande as far south as Santa Fé within five years of the passage of this act, and shall complete fifty miles additional south of said point in each year thereafter, and in default thereof the rights and privileges herein granted shall be rendered null and void *so far as respects the unfinished portion of said road.*"

By the general act of 1875 it was enacted:

"SEC. 1. That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of said road material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road."

By the fourth section of this act it was declared:

"SEC. 4. That any railroad company desiring to secure the benefits of this act, shall within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands, within

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twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

As shown by the agreed statement of facts, the railway company on June 8, 1882, had completed its line westward only as far as Cebolla, Colorado, and has never completed it to Santa Fé. The right of the railway company, under the special act of 1872, to take timber west of Cebolla for the construction of its line accordingly terminated on June 8, 1882. The timber in controversy was taken after that date from the vicinity of Montrose, Montrose County, Colorado, some forty-five miles west of Cebolla, and is justifiable, on the part of the defendant, only under the act of March 3, 1875 — if it is entitled to the benefits of that act.

It is urged on behalf of the plaintiffs in error that the defendant, having accepted the special grant of a right of way, and the right to take timber, made to it by the act of June 8, 1872, and this being a subsisting grant at the time of the passage of the act of March 3, 1875, it cannot rightfully claim the benefits of the latter act. It is said that the two grants could not properly coexist, and that the later act should not be construed as including the defendant railway company, because the special act of 1872 was more beneficial, in the fact that it conferred upon the railway company, and its successors, the right to take timber both for construction and repairs, and that the defendant, having elected to take the benefits of that grant, cannot escape the conditions attached to it, nor claim the benefits of the act of 1875, passed while the defendant was enjoying the special benefits conferred upon it by the act of 1872.

We cannot accede to the correctness of this proposition.

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The general and special acts are in no way inconsistent with each other. The general nature and purpose of the act of 1875 were manifestly to promote the building of railroads through the immense public domain remaining unsettled and undeveloped at the time of its passage. It was not a mere bounty for the benefit of the railroads that might accept its provisions, but was legislation intended to promote the interests of the government in opening to settlement, and in enhancing the value of those public lands through or near which such railroads might be constructed. To induce the investment of capital in the construction of railroads through the public domain, Congress had previously granted special rights, such as were conferred upon the defendant by the act of 1872; but, by this act of 1875, a general offer was made to any and all railroad companies of so much of the public domain as might be necessary for right of way, and ground adjacent thereto, for station buildings, depots, machine shops, side tracks, turnouts, and water stations, with the right to take timber from the public lands adjacent to such road for the construction of the railway, provided such railway company should comply with the provisions of section four of the act. This general offer was not limited or restricted as to the time within which the offer should be accepted, nor in respect to the company or companies who should be entitled to the benefits thereof upon complying with the provisions of the act. Its terms are sufficiently broad and general to include the defendant, who, by the agreed statement of facts, asserted and claimed the benefits thereof as to all that portion of its line of railway constructed after June 8, 1882, when its rights under the act of June 8, 1872, terminated so far as respected its unfinished line west of Cebolla. No railway company could claim the benefits of the act of 1875 until it had accepted its provisions and complied with the conditions required by the fourth section thereof. Upon such compliance, and not before, the benefits intended to be conferred by the act would attach. It does not appear from the record or from the agreed statement of facts at what date the defendant accepted the provisions of the act of 1875, and complied with the conditions upon which it was entitled

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to the benefits thereof. But whether such compliance on the part of the railway company was before or after June 8, 1882, it sufficiently appears that it only claimed and asserted the benefits under that act after its rights under the act of 1872 had terminated, so far as concerns the unfinished portion of its line; for by the eighth paragraph of the agreed statement of facts it is admitted "that as to all of its railway constructed after June 8, 1882, that said company strictly complied with all the requirements of the act of Congress, approved March 3, 1875, entitled 'An act granting railroads the right of way through the public lands of the United States.'"

Now, the act of 1875 remaining in force as a general law and as a general offer to any railway company, the defendant clearly had a right after June 8, 1882, if it did not have before, to claim the benefits of that act. That act was not merely a legislative offer of benefits, but operated as a law of the government and remained in full force and effect, not only while the defendant was enjoying the benefits of the act of 1872, but subsequently, after its rights under that special act had expired. Under these circumstances it cannot be properly said that the railway company is either claiming or asserting rights conferred by, or coexisting under, both the special grant and the general law; for the benefits of the latter, whether accepted before or after the rights conferred by the special act of 1872 had ceased or terminated, were not actually asserted or put in practical use until after June 8, 1882, and then only in respect to unfinished portions of the line not covered by the act of 1872.

No reason is perceived why the defendant, after its rights under the special act had terminated, should not be permitted to take the benefits of the general law of 1875, so far as it related to the construction of its line west of Cebolla, and built after June 8, 1882, when its right to take material for construction ceased under the act of 1872.

Upon what principle does the enjoyment by the defendant of the rights and benefits conferred by the earlier special act preclude or estop it from accepting the benefits offered by the later general act after the special rights and privileges had

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terminated? We know of no such principle. There is nothing in the case of *Railway Co.* v. *Alling*, 99 U. S. 463, cited on behalf of plaintiffs in error, inconsistent with this view of the subject. In that case the Denver Company (the defendant in error here) had in 1871 and 1872 merely made a preliminary survey of its line through the Grand Cañon of the Arkansas, but had postponed the actual location and final appropriation of its roadway through that defile until April, 1878, at which date it was subject to the provisions of the act of 1875, (the second section of which conferred upon other roads the right, upon certain terms and conditions, to use its track or roadway through such defiles,) for the reason that after the passage of that act the Denver Company had accepted the benefit of the act of March 3, 1877, extending the time for the completion of its road to Santa Fé, which extension the court assumed would hardly have been given by Congress except subject to the conditions contained in the act of 1875. Being subject to the provisions of the law, as contained in the second section of the act of 1875, while in the exercise of its rights under the act of 1872, as amended by the act of 1877, in no way prevented the railway company from complying with its conditions and securing the benefits conferred by the first section of the act of 1875. We are, therefore, of opinion that the defendant in error was clearly entitled, after June 8, 1882, if not before, to the benefits of the act of 1875, upon complying, as it did, with the conditions of that act.

But it is urged that, even if the defendant is entitled to the benefits of the act of 1875, it is not permitted to take timber from the public domain and ship it for use in the construction of its railroad at points distant from the place at which the timber was taken, but is limited to the taking and use of timber in the vicinity, or adjacent to the place, where the work of construction is going on; and that it is not entitled to take timber for the erection of depots, section houses, bunk houses, stock yards, water tanks, &c. This presents the question as to where, or at what place, and for what purposes the railway company may rightfully use timber, or other material, taken from the public lands adjacent to the line of

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its road. By the express terms of the act, the timber or other material which it is entitled to take must be taken from public lands "adjacent" to the line of the road, and must not be merely suitable but "necessary for the construction of the railroad." By the agreed statement of facts it is admitted that the timber in question was taken from the public, unoccupied, unentered lands of the United States, which were located along, near, and adjacent to the line of the defendant's road. No question, therefore, can be raised as to the proper locality from which it was taken. Was the defendant, under a proper construction of the act, limited and restricted in the use of such timber for purposes of construction to points or places on the line of the road adjacent to the locality from which the timber was taken? While the act does limit the railway company in respect to the place or locality from which timber or other material may be taken, by confining the right to public lands *adjacent* to the line of the road, it does not, by either express terms, or by any fair or necessary implication, place any limitation as to the place at which such timber may be used. The license to take timber is not, by the language of the act, limited to what is necessary for the construction of such portion of the road as is adjacent to the place from which the timber is taken, but extends to the construction of the entire "railroad." The right is given to use material "necessary for the construction of said railroad." This language treats the railroad as an entirety, in the construction of which it was the purpose of Congress to aid by conferring upon any railway company, entitled to the benefits of the act, the right to take timber necessary for such construction from the public lands adjacent to the line of the road. This intention would be narrowed, if not defeated, if it were held that the timber, which the railway company had the right to take for use in the construction of its line, could be rightfully used only upon such portions of the line as might be contiguous to the place from which the timber was taken. If Congress had intended to impose any such restriction upon the use of timber or other material taken from adjacent public lands, it should have been so expressed. No rule of interpretation requires

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this court to so construe the act as to confine the use of timber that may be taken from a proper place for the purpose of construction to any particular or defined portion of the railroad. To do this would require the court to read into the statute the same language, as to the place of use, which is found in the statute as to the place of taking. In other words, it would require the court to interpolate into the statute the provision that the place at which the timber shall be used shall be "contiguous, adjoining, or adjacent" to the place from which it is taken. The place of *use* is not, by the language of the statute, qualified, restricted, or defined, except to the extent of the construction of the railroad as such, and it is not to be inferred from the restriction or limitation imposed as to the *place* from which it may be rightfully taken that it is to be used only adjacent to such place.

As to the purposes for which the material may be used, it must be borne in mind that the benefits intended to be conferred by the act are not confined or limited to the roadbed, or roadway, as the foundation upon which the superstructure is to rest, but are extended to the "railroad," as a completed or perfected structure.

In addition to the right of way and the right to take timber for the purposes of this completed or entire structure, called the "railroad," there is granted by the act "also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water tanks, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road." By this provision, these structures, which are necessary appurtenances to all railroads, may fairly be regarded as parts or portions of the *railroad*, whose construction it was the purpose of Congress to aid. In its ordinary acceptation and enlarged sense the term *railroad* fairly includes all structures which are necessary and essential to its operation. As already stated, it was not the intention of Congress to aid in the mere construction of the roadbed, or roadway, but to aid in the construction of the railroad as such, which term has a far more extended signification than the mere track, or roadway. If the language of the act

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had shown an intention to aid merely in the construction of the roadbed, or roadway, it is clear that such structures as station houses, &c., would not have been included; but when the ground is given on which to erect such structures in and by the same act which confers the right of way, and also gives the right to take from adjacent public lands timber necessary for the construction of the *railroad* as such, it may be reasonably claimed that timber necessary for that construction may be used or applied in the erection of the structures constituting an essential part or portion of the *railroad*. It is no forced interpretation to hold that the right to take timber was intended to aid in the erection of structures without which the railroad would have been practically useless.

It could hardly be questioned that a grant of power to construct a railroad would include the right to erect necessary structures, such as station houses, water tanks, &c., as essential and constituent parts thereof. This being so, it is difficult to understand why the grant of a right to take timber for the construction of a railroad should not equally extend to and include the same structures, constituting, as they do, necessary and indispensable appendages thereto.

Again, exemption from taxation is construed with greater strictness in favor of the State than grants of public property or rights, for the reason that taxation is more essential to the existence of government than ownership and possession of public property. Yet it has been held in several well-considered cases that where a railroad is exempt from taxation, such exemption extends to structures like those in question. Thus in the case of the *Lehigh Coal and Navigation Co.* v. *Northampton County*, 8 W. & S. 334, it was held that as an incorporated canal was not taxable, not only the bed, berm-bank, and towpath of the canal, but the lock-houses and collectors' houses were also exempt, these being considered constituent parts of the canal or necessarily incident thereto. So in *Railroad Co.* v. *Berks County*, 6 Penn. St. 70, it was held that as the railroad was exempt from taxation, water-stations and depots, including the offices and places to hold cars, &c., being necessary and indispensable to the construction and use of the road, were

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within the exemption, while warehouses and coal lots, intended for the mere convenience of the road, were not so exempt. The principle of these cases is followed and illustrated in the case of *State* v. *Commissioners of Mansfield*, 3 Zabr., (23 N. J. Law,) 510, and in the case of *Worcester* v. *Western Railroad*, 4 Met. (Mass.) 564.

It is undoubtedly, as urged by the plaintiffs in error, the well-settled rule of this court that public grants are construed strictly against the grantees, but they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication. In *Winona & St. Peter Railroad* v. *Barney*, 113 U. S. 618, 625, Mr. Justice Field, speaking for the court, thus states the rule upon this subject: "The acts making the grants . . . are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purposes declared on their face, and read all parts of them together."

Looking to the condition of the country, and the purposes intended to be accomplished by the act, this language of the court furnishes the proper rule of construction of the act of 1875. When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a *quasi* public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted. *Bradley* v. *New York & New Haven Railroad*, 21 Connecticut, 294; Pierce on Railroads, 491.

This is the rule, we think, properly applicable to the con-

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struction of the act of 1875, rather than the more strict rule of construction adopted in the case of purely private grants; and in view of this character of the act, we are of opinion that the benefits intended for the construction of the railroad in permitting the use of timber or other material, should be extended to and include the structures mentioned in the act as a part of such railroad.

It appears from the certificate attached to the agreed statement of facts that a small portion of the timber taken by the defendant, amounting to $150.15, was used in or about "cars." The defendant was not charged by the judgment of the court below with this item, for the reason, as we assume, that these cars were not employed in the transportation of traffic, but were of such character as hand-cars employed in the work of construction. In affirming the judgment of the court below as to this item, this court does not mean to be understood as holding that the defendant, under the act of 1875, has the right to use timber taken from the public lands for the purpose of constructing rolling stock or equipment employed in its transportation business. Neither are we called upon in this case to determine what other structures, if any, besides those enumerated in the first section of the act of 1875, would constitute necessary, essential, or constituent parts of the railroad.

Our conclusion is that there is no error in the judgment below, and that it should be *Affirmed.*

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UNITED STATES *v.* DENVER AND RIO GRANDE RAILROAD COMPANY AND OTHERS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 4. Argued October 10, 1893. — Decided October 23, 1893.

In this case the court follows its rulings in No. 3, *ante*, 1.

THE case is stated in the opinion.

Mr. Solicitor General for plaintiff in error.

Mr. Edward O. Wolcott, (with whom was *Mr. Joel F. Vaile* on the brief,) for defendants in error.

MR. JUSTICE JACKSON delivered the opinion of the court.

This case is controlled by the decision of this court rendered in the case of the *United States* v. *Denver and Rio Grande Railway Co.* The pleadings and the agreed statement of facts[1] present substantially the same questions as are discussed

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[1] *Agreed Statement of Facts.*

It is agreed:

1. That the timber sued for in said action was cut by J. J. Carpenter, X. L. Carpenter, and H. S. Carpenter, as agents of the Denver and Rio Grande Railroad Company, for the use of said company.

2. That the complaint in said action shows the amount of timber cut, and that the same was used as railroad ties.

3. That said timber was cut upon public, unoccupied, and unentered lands of the United States, in Gunnison County, Colorado.

4. That the lands from which said timber was cut were along, near, or adjacent to the line of railway of said company.

5. That one-half of the timber cut, as aforesaid, was cut on lands adjacent or near to the portions of said line of railway which were constructed prior to June 8th, 1882, and the other half of said timber was cut from lands near to, adjacent, and along portions of said line of railway constructed and completed after June 8th, 1882.

6. That the line of railway of the Denver and Rio Grande Railway Company, predecessor in interest and ownership to the Denver and Rio Grande Railroad Company, had not been completed to Santa Fé, on June 8th,

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and decided in the suit against the railway company. The defendant in this case is the successor in title of the Denver and Rio Grande Railway Company, and complied with all the requirements of the act of 1875. The timber, with which it was sought to be charged, was taken early in 1886 for use as cross-ties. About one-half of this timber was taken from the public lands adjacent to the line of the company's road in Montrose County, Colorado, and was used on that portion of its line constructed after June 8, 1882. The rest of the timber was taken from public lands adjacent to the line, constructed prior to June 8, 1882, lying east of Cebolla. The court below held that the defendant had a right to take timber from public lands east of Cebolla for the purpose of repairing its line constructed prior to June 8, 1882, but had no right to take timber from that portion of the line for the purpose of constructing new switches and side tracks along the line of road completed subsequent to June 8, 1882, and for this item, amounting to $1120, the defendant was held liable, and acquiesced in that judgment. The plaintiffs in error seek for a reversal of the judgment on the ground that it improp-

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1882, nor has said line of railway ever been so completed either by the Denver and Rio Grande Railway Company or by the Denver and Rio Grande Railroad Company.

7. That one-fourth of the ties cut, as aforesaid, were used by the Denver and Rio Grande Railroad Company upon various portions of the line of railway formerly owned by the Denver and Rio Grande Railway Company, and subsequently owned by the Denver and Rio Grande Railroad Company, and which portions were constructed and completed prior to June 8th, 1882, said ties being used for purposes of repairs.

8. That one-fourth of said timber has been used in the construction of new switches and side tracks along the line of road completed subsequent to June 8th, 1882.

9. That the remaining one-half of the ties so cut either have been or are intended to be used in the construction of new extensions of said railroad, now in process of building between Montrose and Ouray.

10. That the said Denver and Rio Grande Railroad Company has strictly complied with all the provisions of the act of Congress approved March 3d, 1875, granting railroads a right of way through the public lands, and is claiming under said act as to all road constructed since June 8th, 1882, and as to road now in process of construction.

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erly relieved defendant from liability for the rest of the timber.

We are of opinion that there was no error in the judgment of the Circuit Court, and the same is accordingly

Affirmed.

WOOD *v.* BRADY.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 815. Submitted October 10, 1893. — Decided October 23, 1893.

The construction placed by a state court upon one statute implies no obligation on its part to put the same construction upon a different statute, though the language of the two may be similar.

The question whether an action to foreclose a lien for unpaid assessments for street improvements in San Francisco is *in rem* or *in personam*, is one upon which the decision of the Supreme Court of California is binding, and its ruling that a plaintiff who was no party to defendants' suits to foreclose, has a right to show by evidence *aliunde* the invalidity of the judgments obtained by them, is not a subject for review here.

MOTION to dismiss, or affirm. This action was originally begun by Brady in the Superior Court of San Francisco against a number of defendants, including Wood and Diggins, the plaintiffs in error, to quiet his title to two lots of land, in which it was averred that defendants claimed an interest adverse to the plaintiff. Both parties claimed title under certain assessments for street improvements and sales under proceedings to foreclose liens for such assessments. The assessments under which plaintiff claimed were prior in point of time to those under which defendants claimed, but the deeds issued to defendants antedated those under which the plaintiff claimed.

The assessments upon which plaintiff relied were recorded November 14, 1870; actions were begun against the owners of the two lots early in 1871 to foreclose the liens created by these assessments, and judgments and orders of sale were entered in both cases in January, 1882. Appeals were taken to the Supreme Court in both cases, and the judgments of the

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Statement of the Case.

court below affirmed December 15, 1884, and remittiturs filed January 19, 1885. Both lots were sold by the sheriff to the plaintiff March 31, 1885, and no redemption having been made, sheriff's deeds were delivered October 3, 1885.

On July 10, 1875, other assessments were recorded upon these lots in favor of Diggins; actions were begun to foreclose them December 28, 1875; judgments rendered July 25, 1878, and sale made of lot 5, January 12, 1880, to Diggins, and of lot 6, November 15, 1878, to defendant Wood; and deeds were delivered on May 5, 1881, and November 12, 1879, respectively. By the contracts between Diggins and the superintendent of public streets, which were executed April 19, 1875, it was agreed that the work should be commenced within seven days and completed within fifty days from April 27, 1875; it further appeared that said fifty days expired on the 16th day of June, 1875; that said Diggins commenced the work under his contract and completed the same after the 1st day of July, 1875; that on the 1st day of July, 1875, and not before, Diggins obtained from the Board of Supervisors an extension of time within which to complete the contracts, and no other extension of time was obtained by him within which to complete the work under said contracts.

Other similar assessments were made and recorded upon which foreclosure proceedings were also instituted and carried to judgment and sale. These, however, it is not necessary to specify particularly.

In this connection the Supreme Court of California, to which the case was carried by appeal, held —

1. That the judgments under which Brady held were conclusive as against the owners of the lots in controversy, who had been made defendants in the foreclosure proceedings, and that the sales had transferred the legal title of such owners to the plaintiff, and although the sheriff's deeds made to defendants Wood and Diggins antedated those of the plaintiff, and were based upon judgments prior to those under which plaintiff claimed, yet, as the liens under which plaintiff's judgment were rendered were older than those of the defendants, plaintiff had the superior legal title.

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2. That the most the defendants could claim was that, as they had no notice of plaintiff's foreclosure suits, plaintiff took his title incumbered with all valid liens thereon held by them at the date of the judgment; and that, assuming that defendants did not have this notice, the court did not err in allowing plaintiff to show that the liens under which defendants claimed were not valid.

3. That as to two of the deeds relied upon by defendants, it was found that the work for which the assessment underlying such deeds was made was not completed within the time fixed by the contract, and that the order of the Board of Supervisors granting the extension was not made until after the expiration of the time allowed by the contract for its completion; and, this being so, the contractor never acquired any valid lien upon the property.

4. That as to another deed to defendant Wood, the court found that the Board of Supervisors failed to publish for the length of time required by law the resolution of intention to do the street work which resulted in the subsequent assessment, foreclosure, and sale.

Its conclusion was that the liens upon which defendants' deeds depended for their validity were void, and defendants acquired no interest in the lot as against the plaintiff. *Brady* v. *Burke*, 90 California, 1.

Defendants thereupon sued out this writ of error, which plaintiff moved to dismiss upon the ground that no Federal question was involved.

Mr. James G. Maguire for the motion.

Mr. J. C. Bates opposing.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

In this case the Chief Justice of California has certified that the defendants insisted that the judgments under which they claimed title were valid when the assessments were made and judgments thereon rendered, and that the extensions of time

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granted to do the work mentioned in said contracts were valid and binding under the decisions of the Supreme Court when said judgments were rendered, and that said judgments and assessments could not be impaired by a subsequent judicial construction of the law holding such extensions to have been invalid.

The gist of the error charged by the plaintiff lies in the alleged overruling of a prior decision of the Supreme Court of California in *Taylor* v. *Palmer*, 31 California, 240, which was also an action to recover a street assessment and to enforce a lien for the same against certain real estate in San Francisco. The contract in this case was let and the work done under an act passed in 1862, Act of April 26, 1862, Laws of 1862, c. 297, p. 384, as amended in 1863. The contract required the work to be performed within thirty days. The work was not completed at the expiration of that time, and two days thereafter the time was extended by resolution of the Board of Supervisors. It was claimed that this extension was illegal, but the court held that the power to extend the time was expressly conferred by the act of 1863, which provided that the street "Superintendent shall fix the time for the commencement and completion of the work, under all contracts entered into by him, and may extend the time so fixed from time to time under the direction of the Board of Supervisors." It was held that this power of extension might be exercised after the expiration of the time previously fixed, the act providing that "in all cases where the Superintendent, under the direction of said Board, has extended the time for the performance of contracts, the same shall be held to have been legally extended."

The law remained in this condition until the session of 1871–72, when another act was passed, Act of April 1, 1872, c. 562, Laws 1871–72, p. 804, which applied to the city and county of San Francisco only, but it contained in section 6 the following provision: "Should said contractor, or the property owners, fail to prosecute the same" (the work) "diligently or continuously in the judgment of said Superintendent of Public Streets, Highways and Squares, or complete it within the time prescribed in the contract, or within such extended time, then it

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shall be the duty of the said Superintendent of Public Streets, Highways and Squares, to report the same to the Board of Supervisors, who shall without further petition on behalf of the property owners, order the Clerk of the Board of Supervisors to advertise for bids, as in the first instance, and relet the contract, in the manner hereinbefore provided." It was under this statute that the contracts were let to Wood and Diggins.

The construction of this statute was discussed in 1879 in *Beveridge* v. *Livingstone*, 54 California, 54, and the court held that the requirements of the sixth section were mandatory, and excluded the exercise by the Board or Superintendent of any power to extend the time for completing the work after the expiration of the contract time, or of an extension ordered during the running of the contract time; and that such extension was, therefore, void. The case was distinguished from that of *Taylor* v. *Palmer*, and the court remarked that it was not inclined to be controlled by the authority of that case further than as it construed the exact language of the act of 1863, under which it was decided.

Both contracts between Diggins and the Superintendent had been extended after the time originally limited for the performance of the work, and plaintiff Brady was permitted to show this to impeach defendants' judgments and invalidate their liens. Plaintiffs in error now contend that the construction given by the Supreme Court in *Taylor* v. *Palmer*, in favor of the validity of such extensions, was one upon which Diggins was entitled to rely, and constituted a part of his contract, the obligation of which could not be impaired by a different construction subsequently given. But assuming for the purposes of this case that there may be a vested right under an erroneous decision, it is carrying the doctrine to an unwarrantable extent to say that the construction placed by the court upon one statute implies an obligation on its part to put the same construction upon a different statute, though the language of the two may be similar.

The argument that the language being similar, a like construction should be put upon both acts, is one properly ad-

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dressed to the state court; but when that court has assumed to distinguish between the two acts, it is not within our province to say that the distinction is not well taken. The acts in this case, though similar, are not identical, and there is certainly some ground for saying that the construction of the two should not be the same. The point made by the plaintiffs in error that the decision in *Beveridge* v. *Livingstone* was made retroactive is answered by the fact that courts are bound in their very nature to declare what the law is and has been, and not what it shall be in the future, and that if they were absolutely bound by their prior decisions, they would be without the power to correct their own errors.

But even if it were conceded that defendants had a right to rely upon the Supreme Court giving to the act of 1872 the same construction it had placed upon the act of 1863, that construction was nothing more than that the Board of Supervisors had a discretion to extend the time for the performance of the contract after the time originally limited had expired. It is evident that this was no part of defendants' contracts. Their contracts were to do certain work within a certain time, and the fact that there was a discretion on the part of the Board of Supervisors to extend such time did not enter into or form a part of the contract. It was a discretion which the Board of Supervisors might or might not exercise. If the contractor had violated his contract, he had no legal right to such extension, and took his chances of obtaining it. In other words, there was no possible contract the obligation of which could be impaired by a ruling that the Board of Supervisors had no power to grant such extension.

The question whether an action to foreclose a lien of this kind is *in rem*, or *in personam*, under the practice in California, is one upon which the decision of the Supreme Court is binding, and its ruling that plaintiff, being no party to defendants' suits to foreclose, had a right to show by evidence *aliunde* the invalidity of the judgments obtained by them, is not a proper subject for review by this court.

In no aspect does the case present a Federal question, and the writ is, therefore, *Dismissed.*

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NEW YORK AND TEXAS LAND COMPANY *v.* VOTAW.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

No. 7. Submitted October 10, 1893. — Decided October 23, 1893.

In an action to try the title to land, where there is conflicting evidence as to certain natural objects named in running the lines, an instruction to the jury that if, after fully considering the conflicting evidence they are left doubtful and uncertain, they will be justified in locating the grant by referring to such of the natural objects as are certain, is not error.
Such is the effect of the instruction to the jury in this case.

THE case is stated in the opinion.

Mr. Charles W. Ogden for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE SHIRAS delivered the opinion of the court.

This was an action brought in the Circuit Court of the United States for the Western District of Texas to try the title to a large tract of land in the county of Dimmitt and State of Texas.

The New York and Texas Land Company, the plaintiff, based its claim upon patents issued by the State of Texas to the International and Great Northern Railroad Company, and upon certain deeds of conveyance from said company through several parties down to the plaintiff. The defendant's title originated in a grant of land by the State of Texas to the heirs of one Juan Francisco Lombrano. This grant appears to have been made by the State in recognition of a previous Spanish grant made in 1812 to Lombrano, but the defendant, though reading this Spanish grant as evidence on the question of the boundaries of the tract in question, relied wholly on the patent from the State of Texas.

The record presents no question as to the validity of the title

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of either party, nor any bill of exception touching the admission or rejection of evidence. It was admitted by the plaintiff that the defendant had a valid title to all of the land included in the Lombrano grant, and that such title was prior in time to that asserted by the plaintiffs. The sole controversy was whether the elder Lombrano grant included the lands subsequently granted to the International and Great Northern Railroad Company. This was the issue that was before the court and jury for determination, and to which the evidence of both parties was directed.

We are not asked by the plaintiff in error to consider the evidence in the cause with a view of determining whether it warranted the jury in their verdict in favor of the defendant. The errors complained of are found in certain portions of the charge of the court to the jury, and our only concern with the evidence is to enable us to perceive whether the court committed error in its instructions to the jury.

The description contained in the Spanish grant, and which is followed in the patent made by Texas to the Lombrano heirs, does not give courses, but the lines are run from one natural object to another. The controverted lines are the southern and eastern boundary lines of the Lombrano grant; that is, the lines called for in the Spanish grant as running from Tasa Creek on the Rio Grande, to the junction of the San Ambrosia and San Pedro Creeks, and following up the San Pedro Creek and terminating near its head, and the line running from the head of the San Pedro Creek to the Carrizo Springs.

Several surveys were made, as well under the grant to the Lombrano heirs, as that patented by Texas in 1883, to the International and Great Northern Railroad Company. It appears by these surveys and by the testimony of the engineers who made them, that there were either two creeks used as natural objects in running the lines, viz., San Pedro Creek and San Pablo Creek, or that one creek was known by different persons and at different times, by the two names.

In this condition of the evidence the court instructed the jury as follows:

"1. You are to determine from the evidence whether the

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San Pedro Creek called for in the field-notes of the grant is the creek now called the San Pedro, or whether the creek called at this time the San Pablo was, at the time this survey was made by the surveyor, called the San Pedro Creek; and you will look to all the calls along the creek, and from all the evidence adduced you will determine this, as well as all other questions of fact, by a preponderance of the evidence, wherever the evidence is found to be conflicting.

"2. I may here say that if the lower creek, now called the San Pablo, is the south line of the Lombrano grant, then your verdict will be for the defendant.

"3. If from the evidence you find that some of the calls for natural objects in the grant cannot be ascertained, or, in other words, if the natural objects are not all identified and some of them are, then, and in that case, you will locate the grant with reference to those that are made certain, whether course and distance would reach the natural objects or not; but in case no natural or artificial objects called for can be found and established, then artificial monuments would be of next controlling power; these failing, then course and distance would be the next best means of locating the true boundary of the grant.

"4. From an established point it is competent to reverse the calls, if by so doing we can better ascertain the true boundary of the grant.

"5. The map required by law to be returned by the surveyor with his field-notes, upon which a patent is issued, may properly be considered in connection with the field-notes, and is part thereof in locating the lines of the survey, unless there are calls that control the same.

"6. The field-notes of a survey returned to the General Land Office for patent, and upon which a patent issues, are, to all intents and purposes, a part of the patent, and if a material call in such field-notes is omitted from the patent, a certified copy of such field-notes, duly certified from the General Land Office, will serve to supply such omission, and you will regard the calls in such certified copy of field-notes the same as if correctly copied in the patent.

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"7. If you find from the evidence, after applying the evidence to the calls of the patent, that some or any of the natural objects called for are uncertain or doubtful, and some are certain, the certain ones will govern you in establishing the boundaries of the land.

"8. You are not confined to begin the survey at the beginning or any other particular corner; any intermediate corner or the last corner as you find them on the ground may be adopted by you for the purpose of locating the grant, always giving precedence to the corner that is best identified and that best harmonizes the various calls of the patent in the construction of the survey."

All of these instructions are assigned for error, but the third, fourth, and seventh clauses are those chiefly complained of.

The argument on behalf of the plaintiff in error concedes, in effect, that the instructions do, in a general way and apparently correctly, state the rules of law pertaining to conflicting boundaries; but it is contended that the instructions given were not fairly applicable to the facts in evidence, and presented the issues to the jury in a manner that must have withdrawn their attention from the real question. This contention of the plaintiff in error may be most favorably stated in the following language of the brief of its counsel:

"It is quite true that the court in its general charge to the jury instructed them that they should determine which of the creeks was called the San Pedro at the time the survey was made by a preponderance of evidence, but it is also true that in the sixth clause of the general charge to the jury the court there practically instructed them that they should locate the grant with reference to the natural objects which were made certain. It is submitted that in view of the issues presented in this case and in view of the evidence which was before the jury, even this sixth clause of the general charge was not proper to be given, although the erroneous doctrine is not so clearly stated in this clause of the general charge as it is in the special charge asked by the defendant's counsel. It, however, must be evident that the idea that it was proper for the jury to disregard any natural object called for in the grant,

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in regard to the true location of which there was any conflict of evidence, must have been thoroughly impressed upon the minds of the jury when they were practically so instructed in the general charge of the court and distinctly and unmistakably so instructed in the special charge given at the request of the counsel for the defendant in error.

"It is possible and even probable that a boundary case might arise in which it would be proper for the court to instruct the jury that if any of the objects called for in the grant were not identified by the evidence, they could look to some other calls in the grant to determine its true locality. It is, however, difficult to conceive of a case in which it would ever be proper for the court to instruct the jury that if any of the objects called for in the grant are uncertain or doubtful, they should be disregarded for the reason that if it were a correct instruction in any case it would also be a correct instruction in any other case in which the true location of any objects marking the boundary of a grant was in any manner rendered doubtful by the evidence; and as this would be the situation in every litigated case in which there was a contest in regard to the boundary or in which there was a conflict of evidence, it would of necessity follow that this would be a proper charge to be given in every boundary case in which the object of the investigation was to determine the boundaries of the grant by ascertaining the true location of the objects called for as marking its boundaries. It also follows that it would therefore be proper for the jury in any contested case to disregard all evidence in relation to the very object to ascertain the true location of which the proceeding was had. The very fact that there is a litigation necessary for the purpose of ascertaining the true location of an object in itself renders it doubtful and uncertain, and if the doctrine announced in the charge complained of is correct, being doubtful and uncertain, the jury will not determine its location, therefore the litigation would be useless; there would be no need of litigation with regard to the true location of an object called for in a grant with regard to which there was absolutely no doubt or uncertainty, and if that doubt or uncertainty can-

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not be solved by a judicial investigation it is useless to litigate over the question.

"It must also be evident that if it were proper to instruct the jury in a boundary case that they should make up their verdict without regard to any facts which might be disputed, it would also be proper to so charge them in any other case, and thus all litigation would be at an end."

This criticism assumes that the court instructed the jury that if there was conflicting evidence as to the existence or location of some of the natural objects called for in the respective grants, such objects should be wholly disregarded, and that the verdict should be controlled by the evidence referring to such natural objects as were certain. Such an instruction would, indeed, as argued on behalf of the plaintiffs in error, be equivalent to telling the jury to disregard all evidence in relation to the very object to ascertain the true location of which the proceeding was had, and the mere fact that there was contradictory evidence as to the true location of a boundary line would decide the litigation in favor of the party in possession.

But we are unable to see that these instructions express so unreasonable a proposition. Fairly read, and as the jury must have understood them, we understand these instructions to say not that if there is conflicting evidence as to certain natural objects, the jury should put such evidence and the controverted facts wholly out of view, and look only to other and undisputed facts, but that if, after considering the conflicting evidence, the jury are left doubtful and uncertain, they will be justified in locating the grant by referring to such of the natural objects as are certain. In terms, as well as in substance, the court told the jury that they should determine the true location and name of the boundary creek, as well as all other questions of fact in the case, "from all the evidence, and by a preponderance of the evidence, wherever the evidence was found to be conflicting." The seventh instruction was explicit that "if you find from the evidence, *after applying the evidence to the calls of the patent*, that some or any of the natural objects called for are uncertain or doubtful, and some

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are certain, the certain ones will govern you in establishing the boundaries of the land." Plainly, this does not mean that the jury should refuse to consider and weigh the evidence if conflicting, but that if, after so considering it, there should be doubt as to the proper conclusion to be drawn, such doubts might be resolved by referring to natural objects whose location was certain.

These observations likewise dispose of the further contention that the court below erred in instructing the jury that "from an established point, it is competent to reverse the calls if, by so doing, we can better ascertain the true boundary of the grant." The argument admits that this instruction is formally correct, and only expresses a familiar rule of construction in boundary cases. But it is claimed that, as the court had instructed the jury to disregard all natural objects with respect to which the evidence was conflicting, the jury could, in reversing the calls, skip or disregard such, and run the lines only by objects in regard to which there was no dispute. But, as we have seen, the court had not instructed the jury to disregard the natural objects as to which there was conflicting evidence, but that if they were unable to reach a satisfactory conclusion from the conflicting evidence they should specially regard those facts that were clearly shown. Hence the jury would not, in reversing the calls of the patent, disregard the points and objects in dispute, but would determine, "from all the evidence and by the preponderance of the evidence," the true boundaries of the grant.

We are, therefore, of opinion that there was no error in the instructions of the court to the jury, and the judgment of the Circuit Court is

Affirmed.

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ASPEN MINING AND SMELTING COMPANY *v.* BILLINGS.

SAME *v.* SAME AND OTHERS.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

Nos. 918, 919. Submitted October 10, 1893. — Decided October 23, 1893.

An order allowing an appeal to this court is, so long as the appeal remains unperfected and the cause has not passed into the jurisdiction of the appellate tribunal, subject to the general power of a Circuit Court over its own judgments, decrees, and orders during the existence of the term at which they are made.

Evans v. *State Bank*, 134 U. S. 330, distinguished from this case.

If a motion or petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion is disposed of.

No appeal lies to this court from a judgment of a Circuit Court in execution of a mandate of the Circuit Court of Appeals.

MOTION to dismiss. This was a bill of complaint filed by James O. Wood and others against the Aspen Mining and Smelting Company and others in the Circuit Court of the United States for the District of Colorado on April 14, 1888, which resulted, upon final hearing on pleadings and evidence, in a decree, October 20, 1890, one of the days of the May term, 1890, of the court, dismissing the bill at the costs of the complainants. The record, after setting forth the decree, thus proceeds: "And afterwards, and on, to wit, the 25th day of October, A.D. 1890, came again the said complainants by their solicitor aforesaid, and filed in said court, and in said cause, their motion for rehearing. And the said motion is in words and figures as follows; to wit:" and then follows a lengthy application for rehearing duly indorsed as filed on that day. The November term, 1890, of the Circuit Court began on the first Tuesday, being the fourth day of November, 1890, and adjourned on March 20, 1891. On April 26, 1891, the complainants filed in the cause a "request for decision on motion

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for rehearing," which recited that the motion had been submitted "in open court at the beginning or very early in the last term." The May term, 1891, opened on the first Tuesday, being the 5th day of May, 1891, and on that day the record recites that "the motion for a rehearing of this cause having heretofore come on to be heard, and having been submitted upon briefs," the court being sufficiently advised, denied the motion. On the same day complainants prayed an appeal from the decree to the Supreme Court of the United States, "which is allowed them, conditioned that they file herein their bond conditioned according to law in said appeal in the sum of three hundred dollars." June 24, 1891, counsel filed a direction to the clerk to "make out full record in the above-entitled suit for an appeal to the U. S. Circuit Court of Appeals at St. Louis, Mo.," stating what was to be copied. On July 2, 1891, one of the days of the May term, 1891, of the court, complainants prayed an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, and an order was entered vacating the order allowing an appeal to the Supreme Court of the United States, and allowing an appeal to the Circuit Court of Appeals, conditioned upon the filing of bond in the sum of three hundred dollars, and on the same day such bond was filed and approved together with an assignment of errors on appeal. Citation was issued August 15, 1891, and duly served. From the records of this court it appears that the appeal was duly prosecuted to the Circuit Court of Appeals, and the decree reversed July 5, 1892. And that thereupon the appellees petitioned for a rehearing, which was denied. The opinions of that court will be found reported in 10 U. S. App. 1; Id. 322.

November 7, 1892, appellees on that appeal presented to this court their petition for a writ of *certiorari* under section six of the act of March 3, 1891, which was denied on November 28.

December 21, 1892, the complainants filed in the Circuit Court a mandate from the United States Circuit Court of Appeals for the Eighth Circuit, reversing the decree of the Circuit Court with costs, and directing the court to take fur-

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ther proceedings and enter a decree in conformity with the opinion of said Circuit Court of Appeals.

Objections on behalf of defendants Wheeler and the Aspen Mining Company were thereupon, on December 24, 1892, made to the jurisdiction of the Circuit Court to proceed further with the cause. January 13, 1893, these objections were overruled, and an application, on behalf of the defendant Wheeler, that the question of jurisdiction be certified to the Supreme Court, was denied. The opinion is reported in 53 Fed. Rep. 561. The Circuit Court then, January 24, 1893, entered a decree in pursuance of and in conformity with the directions contained in the opinion of the Circuit Court of Appeals, in compliance with the mandate of that court. On March 21, 1893, an appeal was granted to the Mining Company and Wheeler to this court by one of the Justices thereof, under the fifth section of the act of March 3, 1891; bond to operate as a supersedeas was given as directed, and approved; and citation was issued and served. And, in view of the allowance of the appeal, the Circuit Court, on April 3, 1893, certified the question of the jurisdiction of the Circuit Court to make and enter the decree of January 24, 1893, or to proceed further in the case, to this court for decision. April 15, 1893, a short record was filed by appellees and a motion made to dismiss the appeal, the consideration of which was objected to by counsel for appellants. The then number of the case was 1325. It is now 918. On April 19, a full record was filed by appellants, and the appeal docketed as No. 1326, which is now 919. The motion to dismiss in No. 1325 was postponed, May 10, 1893, to the next term of this court, and counsel for appellees directed to serve notice of the motion to dismiss, and to embrace therein No. 1326. This having been done, the motion to dismiss was submitted on briefs, coupled with a motion to affirm. At the same time a motion was made on behalf of appellants to advance No. 919 under the 32d rule and for oral argument.

Mr. T. A. Green (with whom was *Mr. Felix T. Hughes* on the brief,) for the motion.

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Mr. Calderon Carlisle opposing.

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

By the 32d rule as amended, (146 U. S. 707,) cases brought to this court by writ of error or appeal under section five of the act of March 3, 1891, when the only question at issue is the question of the jurisdiction of the court below, will be advanced on motion and taken on printed briefs or arguments in accordance with the prescription of rule six in regard to motions to dismiss writs of error or appeals; but as this appeal will be disposed of on the motion to dismiss an order to advance is unnecessary, and would, indeed, be superfluous under the circumstances in view of the motion to affirm.

Nor do we find sufficient reason for the allowance of oral argument in the character of the questions involved; nor in the solicitude of appellants' counsel to repel in that form suggestions in the briefs of counsel for appellee questioning the propriety of the application for the allowance of the appeal, as we perceive no ground calling for defence from imputation in that regard. It is sufficient to dismiss the remarks referred to with the observation that they are lacking in the courtesy and temperance of language due from the members of the bar, and as such obnoxious to animadversion. The condition of the record justified the application, and the allowance of the appeal, although upon consideration we are of opinion that it cannot be sustained.

The contention is that the appeal to the Circuit Court of Appeals was unauthorized and void, because the allowance of the appeal to this court, May 6, 1891, vested in it exclusive jurisdiction of the cause, which could not be divested by a vacation of that allowance by the Circuit Court; and also because the original final decree was entered October 20, 1890, one of the days of the May term, 1890, of the Circuit Court, while the appeal to the Circuit Court of Appeals was prayed, allowed, and perfected on July 2, 1891, and at the May term,

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1891, of the Circuit Court, contrary, as insisted, to the rules and the statute.

1. The appeal to this court was allowed on condition that bond should be given as designated, but this was not done nor any other step in effectuation of the appeal taken, and the order of allowance was vacated on a subsequent day of the same term.

The general power of the Circuit Court over its own judgments, decrees, and orders during the existence of the term at which they are made is undeniable, and an order allowing an appeal is subject to that power so long as the appeal remains unperfected and the cause has not passed into the jurisdiction of the appellate tribunal. *Ex parte Roberts*, 15 Wall. 384; *Goddard* v. *Ordway*, 101 U. S. 745; *Draper* v. *Davis*, 102 U. S. 370; *Keyser* v. *Farr*, 105 U. S. 265.

There is nothing to the contrary in *Evans* v. *State Bank*, 134 U. S. 330, in which it was held that our jurisdiction may be maintained when the record on appeal has been filed here during the term to which the appeal was returnable, even though bond had not been approved and citation signed. No such state of case is presented, nor was the question of the power of the court below to set aside its order of allowance involved in that case or in others in which like rulings have been made.

Equally unavailing is the reference to the provision of the joint resolution of March 3, 1891, "to provide for the organization of the Circuit Courts of Appeals," 26 Stat. 1115, that nothing in the act of March 3, 1891, 26 Stat. 826, c. 517, should be held or construed to impair the jurisdiction of the Supreme Court in any case then pending before it, or in respect of any case wherein the appeal had been taken to that court before the first day of July, 1891, for this merely preserved the jurisdiction as stated, and did not operate to give jurisdiction as to appeals not perfected, which would not otherwise have existed.

In our judgment the Circuit Court had power to vacate the allowance of the 5th of May during the term and allow the appeal of July 2, and this, even if after March 3 and prior to

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July 1, 1891, an appeal might have been taken either to this court or the Circuit Court of Appeals, a point suggested, but upon which it is unnecessary to pass.

2. The decree dismissing complainants' bill was entered on October 20, 1890, but an application for a rehearing was made shortly thereafter and during the same term, but not disposed of until May 5, 1891.

The rule is that if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal. *Brockett* v. *Brockett*, 2 How. 238, 249; *Texas & Pacific Railway* v. *Murphy*, 111 U. S. 488; *Memphis* v. *Brown*, 94 U. S. 715.

If this case falls within that category, then the six months within which the appeal had to be taken under section 11 of the Judiciary Act of March 3, 1891, did not commence to run until May 5, 1891, and the appeal was in time.

It is true that equity rule 88 provides that "no rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court;" but if this petition for rehearing was filed in season and entertained by the court, then the decree, although entered in form, did not discharge the parties from their attendance in the cause, and they were bound to follow the petition thus pending to the next term. The suit was thereby prolonged until the application was disposed of in the regular course of proceeding. This is expressly so ruled in *Goddard* v. *Ordway*, *supra*.

In *Giant Powder Co.* v. *California Vigorit Powder Co.*, 5 Fed. Rep. 197; *S. C.* 6 Sawyer, 508, it was said by Mr. Justice Field that equity rule 88 applies only where no petition is presented during the term, and the numerous cases in which it has been held that the time limited for an appeal does not begin to run until a petition for a rehearing properly presented has been disposed of, sustain that view. The decree does not in legal effect remain final while the petition is pending, and

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the prescription of rule 88 must be construed to mean that a rehearing cannot be granted after the lapse of the term unless application is made therefor during the term, and being entertained, the decree is thereby prevented from passing beyond the control of the court. The entertaining of the petition keeps the jurisdiction alive, and the granting of the rehearing may be made absolute, or denied thereafter, as the court may determine.

But it is said this cannot be the result, under either statute or rule, of the mere filing of a motion or petition for rehearing, and that it does not affirmatively appear in this case that the motion or petition was entertained by the court. But we should be inclined to hold, if a decision in that regard were called for, that, since the application was passed upon as having been duly made, the presumption must be indulged that it was entertained by the court in the first instance and during the term at which the decree was pronounced.

3. Apart from these considerations, however, this is an appeal from a decree entered by the Circuit Court in conformity with the mandate from the Circuit Court of Appeals for the Eighth Circuit. That court took jurisdiction, passed upon the case, and determined by its judgment that the appeal had been properly taken. If error was committed in so doing, it is not for the Circuit Court to pass upon that question. The Circuit Court could not do otherwise than carry out the mandate from the Court of Appeals, and could not refuse to do so on the ground of want of jurisdiction in itself or in the appellate court. *Skillern's Executors* v. *May's Executors*, 6 Cranch, 267; *In re Washington & Georgetown Railroad*, 140 U. S. 91; *Gaines* v. *Rugg*, 148 U. S. 228, 241. And no rule is better settled than that an appeal from a decree entered by the court below in accordance with the mandate of the appellate court, cannot be maintained. *Stewart* v. *Salamon*, 97 U. S. 361; *Humphrey* v. *Baker*, 103 U. S. 736; *Texas & Pacific Railway* v. *Anderson*, 149 U. S. 237. If the Circuit Court of Appeals erred, or if, for any reason, its judgment could be held void, the appropriate remedy lay in a *certiorari* from this court to that court. *American Construction Co.* v. *Jacksonville &c.*

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Railway, 148 U. S. 372. And we judicially know from our own records, *Butler* v. *Eaton*, 141 U. S. 240, 243, that the present appellants applied to this court for that writ, and that the application was denied. *Appeal dismissed.*

CORBIN CABINET LOCK COMPANY *v.* EAGLE LOCK COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

No. 42. Argued October 18, 19, 1893. — Decided October 30, 1893.

The first claim under the reissued letters patent No. 10,361, issued to Henry L. Spiegel, July 31, 1883, for improvements in cabinet locks, is void because it broadens and expands the claims in the original patent, and it does not appear that there was any accident, inadvertence, or mistake in the specification and claim of the original, or that it was void or inoperative for any reason which would entitle the patentee to have a reissue.

When an applicant for letters patent makes a broad claim which is rejected, and he acquiesces in the decision and substitutes a narrower claim therefor, he cannot insist upon a construction of the narrowed claim which would cover what was so rejected.

To warrant new and broader claims in a reissue, they must not only be suggested or indicated in the original specification, drawings, or models, but it must appear that they constitute part of the invention intended to be covered by the original patent.

In applications for reissue the patentee cannot incorporate claims covering what had been rejected on the original application.

Letters patent No. 316,411, granted April 21, 1885, to Henry L. Spiegel for improvements in cabinet locks are void for want of patentable invention.

In equity, to prevent the infringement of letters patent. Decree below dismissing the bill, from which the complainant appealed. The case is stated in the opinion.

Mr. John P. Bartlett (with whom was *Mr. Charles E. Mitchell* on the brief,) for appellant.

Mr. Wilmarth H. Thurston and *Mr. Benjamin Price* for appellee.

Mr. Justice Jackson delivered the opinion of the court.

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Opinion of the Court.

The appellant brought this suit against the appellee for the infringement of two letters patent granted to Henry L. Spiegel, for improvements in cabinet-locks — one being reissue letters patent No. 10,361, dated July 31, 1883, and the other No. 316,411, dated April 21, 1885, both of which were assigned by Spiegel to Frank W. Mix, and by Mix to the appellant. They relate to what are known in the trade as "machine" locks, so called from the fact that they are adapted for insertion in mortises cut entirely by machinery or routing-tools, and thus distinguished from the "old-style" lock previously used, which was adapted only for mortises cut or chiselled by hand. The locks covered by the patents are used chiefly on furniture.

It is alleged that the defendant's lock, which is substantially that covered by the Morris L. Orum patent of August 22, 1882, infringes the first claim of the reissue, and the three claims of the patent of 1885. The defences set up as to the reissue are: That the first claim thereof is for a different invention from that described in the original patent; that it is an expansion of the original claim, and is not infringed. As to the patent of 1885, the defences interposed are: That it is anticipated by other persons and patents, and want of patentability. The opinion of the court below dismissing the bill is reported in 37 Fed. Rep. 338. From that decree the present appeal is prosecuted.

The history of the art on this subject is so fully set forth in the opinion of Mr. Justice Brown in the case of *Duer* v. *Corbin Cabinet Lock Co.*, 149 U. S. 216, decided at the last term of this court, that it need not be repeated here.

No special consideration was given by the court below to the first claim of the reissue patent, and while it was not seriously insisted in oral argument before this court, that there was error in the judgment of the court below on this branch of the case, counsel for appellant have nevertheless contended in their brief that the first claim of the reissue patent is valid, and was infringed. It becomes necessary, therefore, to examine the question raised on the reissue patent.

The original patent on which the reissue is founded was

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No. 241,828, dated May 24, 1881. It appears from the file wrapper and contents that in his original application the patentee made three claims, the first being for "cabinet-lock having its rear-plate projecting at each side of the lock-case (at GG), substantially as and for the purpose specified;" the second was for a lock having such projecting rear-plate, and having its front-plate provided with a slit and strip; and the third claim was for a lock having such projecting rear-plate, and having the upper part of such projection bent toward the front-plate (as at G'). Each of these claims was rejected by the Patent Office, the first and broader claim on reference to the Gory patent, No. 138,148, dated April 22, 1873; the second on reference to the Bishop patent, No. 201,219, dated March 12, 1878; and the third on the ground of no invention.

In the letter of rejection it was suggested to the applicant that a "single specific claim, limited to its (the lock's) exact construction," might be allowed. This suggestion was accepted; all three claims originally filed were cancelled, and there was substituted and allowed a single claim as follows: "A cabinet-lock having its rear-plate projecting beyond each side of the lock-case as at GG, and having the upper part of each projection bent toward the front-plate D, combined with the front-plate D, said front-plate having a slit *n*, and strip *m*, substantially as and for the purposes specified."

Having originally sought broader claims, which were rejected, and having acquiesced in such rejection, and having withdrawn such claims and substituted therefor this narrower claim, describing a particular or specific lock, as such, neither the patentee, nor his assignees, can be allowed under the authorities to insist upon such construction of the allowed claim as would cover what had been previously rejected. *Shepard* v. *Carrigan*, 116 U. S. 593; *Roemer* v. *Peddie*, 132 U. S. 313; *Royer* v. *Coupe*, 146 U. S. 524.

Aside from the operation of this estoppel, it is perfectly clear that the action of the Patent Office in rejecting the three original claims was correct, for the "old-style" lock, which was in use long prior to the date of the Spiegel so-called invention, had a projecting front-plate, and a projecting rear-plate.

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which necessarily included a space between them. So, too, the lock of the Gory patent had a projecting rear-plate, but lacked the bent-in feature and slitted front-plate. But the Spiegel patent presented no patentable differences. The specification and claim of the original patent, as allowed, described and covered a lock *per se* of a special construction, and did not extend to or include anything in combination therewith.

In the application for reissue, filed April 28, 1883, the original specification was amended in two material respects. The new matter consisted of a statement describing how a mortise should be formed, and how the lock is to be combined therewith, so as to be held laterally therein, as follows: "By means of the portions of the walls of the mortise which are in front of the locking-plate G′ and in the rear of the front-plate of the lock." And there was also added this further statement: "It will thus be seen that the lock is prevented from lateral displacement by the projections upon the back-plate in combination with the corresponding shape of the mortise, and that it is prevented from vertical displacement by the thin strip *m* and bent part G′." With these additions to the original specification, there were allowed in the reissue, the original claim and three new claims, as follows:

"1. A cabinet-lock having its front-plate and rear-plate extending laterally beyond the body of the lock, in combination with the mortise, whose walls enter the space between the front and rear-plate, whereby fastening screws are dispensed with, substantially as described.

"2. A cabinet-lock having its front-plate and rear-plate extending laterally beyond the body of the lock, and having also the edge G′ upon the rear-plate bent toward the companion plate, substantially as described, and for the purpose specified.

"3. A cabinet-lock having the thin strip *m* and the slit *n* at the lower corner of its outer plate, substantially as described, and for the purpose specified."

Of these reissue claims the first is the only one which it is insisted the defendant's lock infringes. It is perfectly manifest that the new matter in the reissue specification was

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inserted to lay the foundation for either changing the original claim, or the patent covered thereby; or for the purpose of expanding that claim, so as to make it cover substantially what had been rejected on the original application. An examination of the proceedings in the Patent Office, in connection with the original application, and the claim of the original patent, renders it perfectly obvious that the first claim of the reissue is not for the lock as such, but is for a combination of a lock with a mortise, and in this respect it is for a different invention from that described in the single claim of the original patent, which covered only a lock of a definite description. The first claim of the reissue clearly includes, as an element of the combination therein described, a peculiarly constructed mortise to receive the lock. This element the original patent does not indicate as being any part of the invention of the patentee. As already stated, the claim of the original patent is for a lock as such, while the first claim of the reissue is for a combination of that lock with something not claimed as an element in the original patent, viz. a peculiarly shaped mortise. This was a departure from the original claim not warranted by anything appearing in the original specification.

Again, this first claim of the reissue clearly operates to broaden and expand the original claim, in that it omits or contains no reference to any means whatever for holding the lock in place vertically, such as are described in the original claim. It drops out and eliminates elements shown in the original claim, such as the bent-in portion of the plate and the slit *n* and strip *m*, by means of which the necessity for fastening screws was to be dispensed with. This claim of the reissue was, for these reasons, clearly unwarranted. It does not appear that there was any accident, inadvertence, or mistake in the specification and claim of the original patent, or that it was void or inoperative for any reason such as would entitle the patentee to have a reissue thereof.

It is settled by the authorities that to warrant new and broader claims in a reissue, such claims must not be merely suggested or indicated in the original specification, drawings, or models, but it must further appear from the original patent

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that they constitute parts or portions of the invention which were intended or sought to be covered or secured by such original patent. It is also settled by the authorities that in applications for reissue the patentee is not allowed to incorporate or secure claims covering or embracing what had been previously rejected upon his original application. *Bantz* v. *Frantz*, 105 U. S. 160; *Heald* v. *Rice*, 104 U. S. 737; *Miller* v. *Brass Co.*, 104 U. S. 350; *James* v. *Campbell*, 104 U. S. 356; *Topliff* v. *Topliff*, 145 U. S. 156. For these reasons, and other reasons which might be stated, we are clearly of opinion that the first claim of the reissue patent No. 10,361, dated July 31, 1883, is void, and that appellant was entitled to no relief in respect thereto, even if the original patent on which it was founded could be sustained as a valid patent.

In respect to the Spiegel patent of 1885 for improvements in cases for locks, we concur in the conclusion reached by the Circuit Court that it was invalid for want of patentable invention. We are further of opinion that, in view of the state of the art, as shown by the "old-style" lock, by the Gory patent of 1873, and by the Spiegel patent of 1881, the patent of 1885 was fully anticipated.

The application for the patent of 1885, as originally filed, contained a single claim, as follows:

"I claim as my invention the herein described lock-case having overhanging edges and a front-plate projecting laterally and below the adjacent sides of the case, and rounded at the bottom, whereby the lock is adapted for insertion in a routed cavity into which the lock-plate fits, substantially as described."

This was a broad claim to a lock having a projecting front-plate and a projecting cap-plate, so as to form intervening spaces or grooves on the opposite edges of the lock-case, the front-plate being rounded at the bottom. It was practically for the same construction of lock-case as shown in the prior Spiegel patent of 1881, except that the front-plate was to be rounded at the bottom. This claim on an interference with the Orum patent No. 262,977, of 1882, was rejected, the Commissioner of Patents holding that Spiegel had no right to make

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a claim any broader than the specific device which he showed. He thereupon amended his claim so as to read as follows:

"A lock-case having a top-plate and an overhanging cap, and a front-plate projecting beyond the adjacent walls of the cap, and rounded at the bottom, whereby the lock is adapted to be inserted and held in a routed cavity by the projecting front and cap-plates."

It was held by the Commissioner of Patents, under the interference already referred to, that this claim was lacking in patentability.

Spiegel subsequently presented a specification which, after describing the state of the art, and referring to the original patent of May 24, 1881, stated that "while this latter construction of lock possesses valuable features of improvement not disclosed by the prior art, yet the form of lock shown and described in the patent is such as to preclude its adoption for use in routed cavities, because its front-plate is not of the proper form to fit within and cover a cavity made by a routing-tool. The object of this invention is to obviate the objectionable features hereinbefore set forth, and provide a lock-case of such form and construction that it may have a projecting key-post, if so desired, and be secured within a routed cavity and snugly retained therein, so as to conceal the cavity from view, and form a neat and finished appearance when in place. With these ends in view, my invention consists in a lock-case having its edges constructed to engage or interlock with the side walls of a routed cavity, and provided with a front-plate having a rounded bottom, adapted to fit within a countersunk recess around the routed cavity and constitute a support for the lock-case and conceal the cavity from view."

What he claimed as new and desired to obtain by letters patent was:

"1. A lock-case having a front-plate formed with a rounded bottom, a cap-plate forming in connection with the front-plate intervening spaces or grooves on the opposite edges of the lock-case, and a top-plate extending over and beyond the cap-plate, the projecting edges of the front-plate being adapted to fit within a countersunk recess around the routed cavity within which the lock-case is inserted, substantially as set forth.

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"2. A lock-case having a front-plate formed with a rounded bottom, a cap-plate secured to or connected with the front-plate and constructed to form therewith intervening spaces or grooves on opposite edges of the lock-case, and a top-plate extending over and beyond the cap-plate, in combination with a support having a routed cavity provided with a countersunk recess adapted to receive the outer and projecting edges of the front-plate, substantially as set forth.

"3. A lock-case having a front-plate formed with a rounded bottom, a cap-plate secured to or connected with the front-plate and constructed to form therewith intervening spaces or grooves on opposite edges of the lock-case to retain it in place within the routed cavity, and a top-plate extending over and beyond the cap-plate, in combination with a support provided with a rounded cavity of a depth sufficient to receive the projecting edge of the top-plate flush therein, substantially as set forth."

These claims were several times rejected by several different examiners, and Commissioners of the Patent Office, because they were lacking in patentable invention, and were anticipated by the prior state of the art and previous patents. How they came to be finally allowed and issued is wholly unexplained in the record.

The claim to invention in this patent of 1885 must rest upon differences which existed, if any, between the lock and the mortise, therein described, and what was shown and disclosed in the prior state of the art, and in the Gory patent of 1873, and the Spiegel patent of 1881. In the lock of the patent of 1881, the front-plate was straight at the bottom instead of being rounded as in the patent of 1885. This change involved nothing more than mechanical skill so as to make the bottom of the front-plate fit in the routed cavity, which was necessarily rounded. The further change described in the patent of 1885, of a countersunk recess to receive the projecting front-plate of the lock, flush therewith, was not new; for such countersunk recess was frequently found in the "old-style" locks, when it was desired to make the front-plate thereof flush for the purpose of presenting a neat finish. This countersunk recess, used in connection with the "old-style" locks, was

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made by hand-chiselling, and was intended to present or produce a neat finish. The making of such countersunk recess for substantially the same purpose in the patent of 1885 by a routing-tool instead of by hand-chiselling, did not rise to the dignity of an invention. The change involved nothing more than mechanical skill, which was produced by a change in the form of the routing machine.

Again, the Gory patent of 1873 shows a lock with a round bottom front-plate, and it further shows that the front-plate of that lock projects below the body of the lock, though it does not project at the sides; while the Sargent patent, No. 210,807, dated December 10, 1878, shows a lock having a round bottom front-plate, which front-plate projects below and at the sides of the body of the lock, as in the Spiegel lock, patented in 1885. The purpose of rounding the front-plates at the bottom in both of the locks of the Gory and Sargent patents was to enable them to fit in a rounded or routed cavity. So the countersunk recess, made for the purpose of receiving the projecting front-plate flush, was old, and called for no invention on the part of Spiegel. What Spiegel did in this respect was what had long before been done in the use of the "old-style" locks. The fact that he made his mortise, including the countersunk recess, with a routing-tool instead of by hand-chiselling, certainly does not rise to the dignity of invention. In his arrangement of the lock and mortise, the lock is supported vertically by the selvage, and the sole object of letting the front-plate in flush by means of the countersunk recess was to produce a neater finish and more attractive article than could be produced without such countersunk recess, or, as he expresses it in his specification, "to conceal the cavity from view and form a neat and finished appearance when in place." All that Spiegel did was to make his mortise, including the countersunk recess, with a routing-tool, so that it would be rounded at the bottom, and then make the front-plate of his lock rounded to correspond with this rounded cavity, and fit in flush in the countersunk recess. This change exhibits no patentable subject of invention over and above that which is disclosed in his prior patent of 1881, and shown

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Counsel for Appellees.

in the Gory and Sargent patents. These changes were simply obvious modifications of such prior patents, and cannot be sustained as a patentable invention.

We are of opinion, therefore, that there was no error in the decree below and that the judgment should be

Affirmed.

Mr. Justice Brown did not sit in this case and took no part in its discussion.

GORDON *v.* WARDER.

GORDON *v.* HOOVER.

GORDON *v.* CHAMPION MACHINE COMPANY.

GORDON *v.* WHITELEY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Nos. 34, 35, 36, 37. Argued October 16, 17, 1893. — Decided October 30, 1893.

The first claim in letters patent No. 77,878, granted May 11, 1868, to James F. Gordon, was a claim "for a binding arm capable of adjustment in the direction of the length of the grain, in combination with an automatic twisting device, substantially as and for the purposes described;" and it was not infringed by the devices used by the defendants for attaining the common purpose of securing the stalks of grain into bundles by passing around them a band at the middle of the stalks.

These four bills in equity, for the alleged infringement of the same letters patent by different parties, were argued together here. In each the bill was dismissed below, from which decree the complainant appealed in each case.

Mr. Esek Cowen and *Mr. Frederick P. Fish* for appellants.

Mr. Robert H. Parkinson and *Mr. Edmund Wetmore* for appellees.

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MR. JUSTICE SHIRAS delivered the opinion of the court.

These are appeals from decrees of the Circuit Court of the United States for the Southern District of Ohio, dismissing the bill of complaint in each of the four cases. The questions in controversy are the same in all of the cases, and can be considered and determined in one opinion.

The bills of complaint, as originally filed, averred infringements by the defendants of three different patents, respectively dated May 12, 1868, June 16, 1874, and October 26, 1875, granted to James F. Gordon, and held and owned by the several complainants; but, before final hearing, the complainants withdrew those portions of the bills that pertained to the two latter patents, and the decrees only dealt with the alleged infringement of the letters patent dated May 12, 1868.

The invention of James F. Gordon related to an improvement in that class of harvesters by which the grain, as it is cut, is bound by the operation of the machine. It was not claimed by Gordon that he was the first to devise a grain binder as part of a harvester; such devices were well known in the art. A practical difficulty in the operation of such machines was found in the fact that, in different fields of grain, and often in the same field, the grain stalks were of different lengths. Hence, if the binding apparatus occupied a fixed and unchangeable position with respect to the bundle or gavel of grain when brought to the operation of the binder, the binding wire or cord would be passed round the bundle without reference to the length of the stalks, and thus it would happen that the cord that would pass around the middle of a bundle of long stalks would, in case the stalks were short, pass round the bundle near the head of the stalks. A sheaf formed by the passage of the cord round the bundle at any place, except the middle of the stalks, will be apt to fall apart, and the operation of binding thus become unsuccessful.

Gordon claimed to have surmounted this difficulty by contriving a binding apparatus that should be movable at the will

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of the operator, and adjustable to suit the varying lengths of the grain, and thus operate to pass the binding cord always round the middle of the stalks.

Having, in the specification forming part of his letters patent, described the difficulty to be overcome and the method devised by him to do so, the inventor made eleven several claims to different parts and combinations of parts in his machine. In this litigation, however, the complainants have restricted their case, as against these defendants, to an alleged infringement of the first claim made by Gordon.

This claim is for "a binding arm, capable of adjustment in the direction of the length of the grain, in combination with an automatic twisting device, substantially as and for the purposes described." The specification discloses that the binding arm and the twisting device are to remain in juxtaposition with each other, and are adjustable, with respect to the grain to be bound, by a movement horizontally along a shaft, so as always to apply the binding wire to the centre of the sheaf. This longitudinal movement is regulated by a lever, which is applied by the driver or operator, and which enables him to change the position of the binding arm and twister so as to operate on the middle of the bundle of grain.

The view that we take of these cases relieves us from going at length into the history of mechanical binding devices, and from minutely considering the nature of Gordon's first claim. We content ourselves with saying that, upon the evidence laid before us, we are satisfied that Gordon was the first inventor of a mechanical binder and twister adjustable, at the will of the operator, to affect the binding by passing the cord or wire round the middle of the bundle, where this adjustability was reached by mounting the binder and twister upon a frame which was movable upon a shaft in a longitudinal direction. We are willing to adopt, as a fair definition of Gordon's claim, that given by complainant's counsel in his brief: "The invention of Gordon consisted in this: In so arranging the binding arm and twister, or its equivalent, that while they continuously act with each other, for the purpose of placing the band around the grain and uniting the ends of the band, the driver

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can instantaneously change their position with reference to the grain-delivering mechanism of the harvester, so as to lay the band in the centre of the bundle, without stopping the machine or dismounting from his seat."

We do not regard the patent of Watson, Renwick and Watson, dated May 13, 1851, as an anticipation of Gordon, although the specification in that case did contain a paragraph stating that it might be advantageous, in some cases, to make the binder adjustable in respect to the cutting apparatus. No means were there provided, or method pointed out, whereby such a desirable result could be obtained. Nor do we find, in the other patents put in evidence by the defendants, any such anticipation of the Gordon claim as above defined, as to invalidate the grant made to Gordon on May 12, 1868, though such a state or condition of the art was brought about, by these earlier patents, as to require us to restrict the scope of the Gordon patent closely to the devices and methods claimed by him.

It was claimed on behalf of the defendants, and apparently conceded by the court below, that in the Gordon machine the rake, which gathers and moves the grain to the place where the bundle is to be bound, is a part of the binding mechanism; that without the action of the rake, as an adjunct of the binding apparatus, no successful operation could be effected. But Gordon, while describing the rake and its mode of operation, does not claim the rake as a part of his combination. His invention assumes that some instrumentality must be used to bring the grain within the grasp of the binder, but his claim can and must be restricted to the devices applied by him to render the binder and twister adjustable, at the will of the driver, to the varying lengths of the stalks to be bound. It was further contended, on behalf of the defendants, that the Gordon invention is exemplified by a machine into which harvesting or cutting devices and binding devices are incorporated as integral parts, and in which some of the parts belong equally to the harvesting mechanism and to the binding mechanism. The object of this contention was to afford a ground on which to distinguish the defendants' machine, which

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is claimed to consist of an aggregation of two distinct and independent organisms, to wit, a complete harvesting machine and a complete binding machine.

It is doubtless true that several of Gordon's claims do apparently involve a claim of parts of the harvesting machine in combination with the binding apparatus, thus constituting an organic whole. But, as we have seen, the complainants have withdrawn from our consideration all of the claims except the first, and that is restricted, as above stated, to the special devices therein described.

We do not attach much importance to the defendants' contention that Gordon's invention was not a practical success. Our examination of the evidence in that respect has not satisfied us that the alleged failure, in the harvest field, of machines embodying the Gordon invention was owing to the failure of the binding and twisting apparatus to successfully operate, but it rather seems to have been occasioned by mechanical defects in other parts of the harvesters. On the other hand, there was testimony that, in several instances, the Gordon apparatus operated successfully.

This brings us to a consideration of the question of infringement.

A large part of the argument on behalf of the defendants goes to show that the Gordon patent is substantially for a machine combining the cutter and rake and other parts of a harvester with the binder and twister, all the parts being mounted on one frame, and constituting an organic whole; whereas the defendants use, in combination, two machines, each complete in itself, one a harvesting machine composed of a substantial frame, in and upon which are erected mechanisms for cutting grain, for moving the grain, when cut, laterally as it falls upon the platform, and for elevating and discharging it over the top of the main wheel, upon which the greater portion of the weight of the machine is supported, together with suitable gearing for transmitting from the main wheel the necessary power to operate these mechanisms; the other, a binding machine composed of another frame, in and upon which are erected devices for packing grain into bundles, for

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compressing said bundles, for applying and tying a cord around the compressed part of each bundle, and for discharging the bound bundle to the ground, together with suitable gearing for transmitting motion to these devices from the prime shaft of the binder.

The Gordon specification does seem to describe a composite machine whose purpose is to cut and bind the grain, and if the eleven claims are read together, as if they constituted the invention claimed, the defendants' argument would properly demand that we should consider the distinction suggested between a machine composed of the cutting and binding apparatus mounted upon one frame and constituting an entirety, and two machines coöperating in the manner used by the defendants.

But as the complainants have restricted their case to an alleged infringement of the first claim, and as that claim is merely for the devices used to make the binder and twister movable, at the will of the operator, along a horizontal shaft, we are only called upon to compare the devices of Gordon with those used by the defendants, for attaining a common purpose, namely, securing the stalks of grain into bundles by passing around them a band at the middle of the stalks.

Bearing in mind the previously given definition of Gordon's claim, we shall now compare it with the devices used by the defendants in converting a bundle of stalks into a sheaf.

A distinction is pointed out between a twister and a knotter, one designed for use when a wire forms the band, and the other for use when a cord or string is used. But we do not regard such a distinction as a vital one, and prefer to consider the twister and the knotter as substitutes for and equivalents of each other.

The novelty of the structure mentioned in the first claim of the Gordon patent consists solely in the fact that the automatic twisting device and the binding arm possess the capacity of fore and aft adjustment with relation to all the other parts of the binding apparatus, including the binder receptacle, which is the platform extension upon which the bundle of grain, collected by the rake, is deposited preparatory to

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being bound; and the binding arm and twisting device are adapted to slide upon the shafts by which they are operated, for the purpose of adjusting the machine for binding the bundles in the middle.

The defendants have mounted both binding arm and knotter immovably in the supporting frame of the binding machine, excluding the capacity for adjustment with which Gordon endowed them. The arm and knotter are not pushed backward and forward on their shafts. To adjust for central binding, the entire binding machine is moved bodily frontward or rearward, in order to bring different parts of the binder opposite the centre of the path along which the grain is delivered from the harvester elevator belts.

In the Gordon machine the devices belonging to the binder cannot be taken away without dismantling the harvester, or if the harvester be left intact, then what is left of the binding mechanism will not be operative as a binder. In defendants' case, the binding mechanism can be wholly detached from the harvester without in any way affecting the capacity of the harvester to operate, and when so removed the binder will continue to operate as such whenever it is fed with grain and power is applied to its shaft. Doubtless this difference between the two machines would not, of itself, prevent the complainants from claiming an infringement of the Gordon first claim, restricted, as it is, to the method of adjusting the binder and twister. But, as above stated, and as clearly appears on an inspection of the defendants' machines, their devices to bring the bundles to the binder, so as to present them to be bound in the middle, are altogether different from those described in Gordon's first claim. The end sought to be effected is the same in both methods, but the devices are not the same; and in the state of the art, as shown by the earlier patents in evidence, and of which we may mention the patent of Watson, Renwick and Watson, dated May 13, 1851; of Watson and Renwick, dated June 6, 1853; of S. S. Hurlburt, dated February 4, 1851; of Sherwood, dated September 14, 1858, and August 30, 1859; we cannot regard Gordon's first claim as entitled to protection as a pioneer invention, covering the

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achievement of the desired result in its widest form, unlimited by specific details. If this claim can be sustained, in the light of the previous inventions, it can only be done by restricting it narrowly to the particular devices described, and under such a construction the machines of defendants cannot be deemed to infringe.

None of the defendants are shown to have ever made, sold, or used a machine containing a binding arm and twister, or any equivalent device, adjustable with reference to the binding machine in which they are mounted, or with reference to the platform on which the binding takes place, or with reference to the bundles of grain in position to be bound. In the defendants' machines the binding arm and knot-tying mechanism are permanently secured in a fixed position and incapable of adjustment by being moved to and fro in the machine. When the binding machine itself is moved so as to adjust it to the middle of the stalks to be bound, the binding arm and tying mechanism, by virtue of their permanent attachment to the frame of the machine, are necessarily moved with it, but they cannot be adjusted in it.

Our examination of these cases has brought us to the conclusion reached by the court below, and its decrees, dismissing the several bills of complaint, are, therefore,

Affirmed.

UNITED STATES *v.* BAIRD.

APPEAL FROM THE COURT OF CLAIMS.

No. 963. Submitted October 20, 1893. — Decided October 30, 1893.

A marshal of the United States is not entitled to commissions on disbursements for the support of a penitentiary, made under Rev. Stat. § 1892.

THIS was a petition by the marshal of the United States for the Territory of Idaho for fees earned in executing warrants of commitment of certain prisoners to the penitentiary at Boisé City, and also for commissions upon disbursements for

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the support of such penitentiary. In connection with the latter claim the court made the following findings of fact:

"IV. He also, as such marshal, disbursed the sum of fifty-four thousand four hundred and twenty dollars and fifteen cents, ($54,420.15,) funds of the United States, for the use of the penitentiary of said Territory. For such penitentiary disbursements he claimed a commission at the rate of two per cent, amounting to one thousand and eighty-eight dollars and forty cents, ($1088.40,) and his account for the same was likewise approved by said District Court for the First District of Idaho.

"V. The only reason why no commission was allowed him on such disbursements appears to have been that he was allowed compensation for the services required by section 1893 in the government of such penitentiary, which said compensation was fixed by the Attorney General in accordance with said section at the rate of one thousand two hundred dollars ($1200) a year."

Upon this finding the court rendered judgment in his favor upon the last item for $1088.40, and the United States appealed.

Mr. Assistant Attorney General Dodge and *Mr. Charles C. Binney* for appellants.

Mr. George A. King for appellee.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

Plaintiff having withdrawn the claim for mileage in executing warrants of commitment in consequence of the ruling of this court in *United States* v. *Tanner*, 147 U. S. 661, it only remains to consider his claim for commissions for disbursements for the support of the penitentiary.

This claim is based upon the general fee bill, Rev. Stat. § 829, which allows to the marshal "for disbursing money to jurors and witnesses, and for other expenses, two per centum."

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The practice has been to make this allowance for all disbursements made by the marshal in his official capacity.

But by Rev. Stat. § 1892, another anomalous and extraordinary duty is imposed upon certain territorial marshals, *of caring for and controlling* "any penitentiary which has been, or may hereafter be, erected by the United States in an organized Territory," and by section 1893 it is provided as follows: "The Attorney General of the United States shall prescribe all needful rules and regulations for the government of such penitentiary, and the marshal having charge thereof shall cause them to be duly and faithfully executed and obeyed, and the reasonable compensation of the marshal and of his deputies for their services under such regulations shall be fixed by the Attorney General." The compensation of the commissioner for these services was fixed by the Attorney General at $1200 per annum.

It is evident from this statement that petitioner held practically two distinct offices, namely, marshal of the Territory, for which he received the fees of the office, and also keeper or warden of the territorial penitentiary, for which he received a compensation of $1200 per year. There was no necessary connection between these two offices. If the custody of the penitentiary had been by law assigned to a different person, with a salaried compensation, it would never be claimed that he would be entitled to a commission for the money expended for its support. The case is not altered by the fact that the marshal was assigned to this duty. The very language of section 829 indicates that the marshal's commission extends only to disbursements "to jurors and witnesses, and for other expenses," to the definition of which *other* expenses the rule of *ejusdem generis* applies.

Upon the other hand, if "the reasonable compensation of the marshal and of his deputies for their services under such regulations" "for the government of such penitentiary" did not extend to his services in paying the bills of the penitentiary, it is difficult to see what is meant by the statute. The duties of the marshal are those of supervision, of hiring guards, feeding and clothing prisoners, and supplying the prison with

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fuel, lights, and furniture, and paying for the same, and it is impossible to make a distinction between these classes of services. Payment is a necessary incident to hiring and purchasing, and one is as much a service under the regulations for the government of the penitentiary as the other.

The judgment of the court below must be

Reversed, and the case remanded with directions to dismiss the petition.

MOORE v. UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

No. 789. Submitted October 20, 1893. — Decided October 30, 1893.

When the tendency of testimony offered in a criminal case is to throw light upon a particular fact, or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge which a court of errors will not interfere with, unless it manifestly appears that the testimony has no legitimate bearing upon the question at issue, and is calculated to prejudice the accused in the minds of the jurors.

When a necessity arises for a resort to circumstantial evidence in a criminal trial, objections on the ground of relevancy are not favored, as the effect of circumstantial facts depends upon their connection with each other, and considerable latitude is allowed on the question of motive.

The fact that such testimony also has a tendency to show that the defendant was guilty of the alleged offence is not sufficient reason for its exclusion, if otherwise competent.

Acting on these principles, the court sustains the ruling of the court below admitting testimony stated at length in the opinion, to show a motive for the alleged murder.

An exception to the denial of a motion for a new trial on the ground that the verdict was not supported by the evidence is untenable under repeated rulings of this court.

THIS was a writ of error upon the conviction of the plaintiff in error for the murder of Charles Palmer, on July 25, 1889, in Blue County, Indian Territory. Nelson Moore, defendant's brother, was indicted with him, but was not tried.

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Statement of the Case.

Upon the trial of the case, after the witnesses of the government had shown that Charles Palmer, the person alleged to have been murdered by the defendant, was found on the 25th day of May, 1889, the evidence further showing that he had been murdered by some person or persons, the United States attorney proposed to prove that one Camp had disappeared from the same neighborhood during the month of November, 1888, and had not been heard from since; that he was last seen in company with defendant and his brother, Nelson Moore; that Palmer had been trying to find Camp's body, and that defendant knew that he had been investigating Camp's disappearance. Concerning which the testimony of the proposed witness, Kitty Young, formerly Mrs. Palmer, relative to said Camp, was substantially as follows:

"Tom Moore, Nelse Moore, and Mr. Camp kept batch and lived together about ¼ of a mile from my husband, Charles Palmer. About 9 o'clock at night during the month of November, 1888, Nelse Moore and Mr. Camp was at our house to borrow a horse from my husband to drive the next day to a wagon, stating they were going to Caddo. They did not get the horse. Mr. Palmer and myself promised Mr. Camp we would go down to the house and milk his cows while he was gone. Soon after they left on foot that night I heard a gun in the direction of their house. About 1 o'clock A.M. I saw Mr. Camp's wagon and horses pass our house coming from the direction of where they lived. Immediately after breakfast Mr. Palmer and myself went down to the Moores' house to milk the cows. There was no one there. We saw blood in the house and everything torn up around in the house. We saw a fresh horse wagon tracks which led down into the bottom. We followed it some distance and noticed where it returned by a different road and came into the road which passes our house. About five days after this Nelse Moore returned alone with the team and wagon that belonged to Camp. He was wearing Camp's boots. The defendant and Nelse claimed Camp's clothes, horses, watch, wagon, cows, and all the property which Camp had. I have never seen or heard of Camp since the night referred to.

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"Mr. Palmer was down in the woods hog hunting on Thursday before he was killed. When he returned that evening Tom Moore asked him where he had been. Mr. Palmer stated that he had been in the bottom hog hunting. Tom Moore said, 'Yes, I know the kind of hogs you were looking for.'

"Tom and Nelse Moore owned no stock or property. Tom had no money. Mr. Palmer had been furnishing him provisions. Tom had been hired to Mr. Palmer, was familiar with the premises. Had been clearing land for Mr. Palmer on the place we lived on. The defendants claimed to have bought all Camp's property."

The court admitted this testimony to show, not that Camp had been killed by defendant, but as a motive for his alleged murder of Palmer. To this the defendant excepted upon the ground that the testimony had a direct tendency to prejudice the minds of the jurors.

The only other error alleged was to the refusal of the court to grant a new trial upon the ground that the verdict "was not supported by that amount and character of evidence that is required by law."

No appearance for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendants in error.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

The testimony on behalf of the prosecution tended to show that Charles Palmer, who had been seen alive about 12 o'clock, was found lying dead in the road in Sandy Creek bottom, about two miles from his home, at 4 o'clock of the same day. About three or four hundred yards from where the body was found, the defendant, Tom Moore, was seen by two witnesses about 2 or 3 o'clock of the same day, coming toward them and carrying a Winchester gun. When he saw them he turned off

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at a fast walk out of sight. The wounds in Palmer's body were made with a Winchester gun or a pistol. Defendant was a person of no means, living with his brother, Nelson Moore, about a quarter of a mile from Palmer's, for whom he had been at work, clearing his land. Palmer's land was rented from an Indian. This land was also claimed by a full-blooded Choctaw woman named Lizzie Lishtubbi. Four days before the murder defendant Moore married this woman. He had previously boasted that he was going to marry the woman and get the land; "that she was old and would not live long, and he would get a good stake." One of the witnesses told him that he would have trouble over it, as Charles Palmer was about the gamiest man in the Territory. He replied: "I am some that way myself." As he started to leave, he said: "I may not get to marry the widow; and if I do not, if you give me away, I will kill you." But the witness thought it merely a good-natured remark, as he was laughing at the time.

We think it was within the discretion of the court to admit the testimony in dispute of Kitty Young. As intimated in the case of *Alexander* v. *United States*, 138 U. S. 353, where the question relates to the tendency of certain testimony to throw light upon a particular fact, or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge which a court of errors will not interfere with, unless it manifestly appear that the testimony has no legitimate bearing upon the question at issue, and is calculated to prejudice the accused in the minds of the jurors. There are many circumstances connected with a trial, the pertinency of which a judge who has listened to the testimony, and observed the conduct of the parties and witnesses, is better able to estimate the value of than an appellate court, which is confined in its examination to the very words of the witnesses, perhaps imperfectly taken down by the reporter. It was said by Mr. Justice Clifford, in delivering the opinion of this court in *Castle* v. *Bullard*, 23 How. 172, 187, that "whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored, for

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the reason that the force and effect of circumstantial facts usually, and almost necessarily, depend upon their connection with each other." And in *Hendrickson* v. *People*, 10 N. Y. 13, 31, it is said that "considerable latitude is allowed on the question of motive. Just in proportion to the depravity of the mind would a motive be trifling and insignificant which might prompt the commission of a great crime. We can never say the motive was adequate to the offence; for human minds would differ in their ideas of adequacy, according to their own estimate of the enormity of crime, and a virtuous mind would find no motive sufficient to justify the felonious taking of human life." See also *Shailer* v. *Bumstead*, 99 Mass. 112, 130; *Commonwealth* v. *Coe*, 115 Mass. 481, 504; *Commonwealth* v. *Pomeroy*, 117 Mass. 143; *Murphy* v. *People*, 63 N. Y. 590, 594; *Kennedy* v. *People*, 39 N. Y. 245; *People* v. *Harris*, 136 N. Y. 423; *Commonwealth* v. *Abbott*, 130 Mass. 472.

Even conceding that the prosecution had shown a motive for the murder of Palmer in the fact that he was in possession of land to which defendant's wife also had a claim, the further facts that Palmer was known by the defendant to have been down in the bottom where Camp had been suspected of being murdered, taken in connection with the blood found at the house jointly occupied by himself and the Moores, the report of a gun heard in the direction of the house, the wagon tracks leading toward the bottom where he was thought to have been murdered, and the subsequent return of one of the Moores with Camp's team and clothes, and wearing his boots, were such as were calculated to excite defendant's suspicion that Palmer was there for the purpose of investigating the circumstances of Camp's death and his connection with it.

The fact that the testimony also had a tendency to show that defendant had been guilty of Camp's murder would not be sufficient to exclude it, if it were otherwise competent. 1 Greenl. Ev. § 3; *Farris* v. *People*, 129 Illinois, 521; *People* v. *Harris*, 136 N. Y. 423.

The exception to the denial of the motion for a new trial upon the ground that the verdict was not supported by the amount and character of evidence that is required by law, was

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untenable under the repeated rulings of this court. *Crumpton* v. *United States*, 138 U. S. 361, 365; *Wilson* v. *Everett*, 139 U. S. 616, 621; *Van Stone* v. *Stillwell & Bierce Mfg. Co.*, 142 U. S. 128, 134.

There was no error in the rulings of the court below, and the judgment is, therefore,

Affirmed.

COLLINS *v.* UNITED STATES.

ERROR FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

No. 821. Submitted October 19, 1893. — Decided October 30, 1893.

On the trial of a person indicted for murder, it appeared that the deceased in a drunken fit assaulted the brother of the defendant, that the defendant, who was dancing, left the dance, went in search of his pistol, returned with it and shot the offender, and that after going away, he returned a few minutes later, put the pistol close to the head of the deceased and fired a second time. The court below instructed the jury, in substance, that, if the defendant in a moment of passion, aroused by the wrongful treatment of his brother, and without any previous preparation, did the shooting, the offence would be manslaughter; but if he prepared himself to kill, and had a previous purpose to do so, then the mere fact of passion would not reduce the crime below murder. *Held*, that there was no error in this instruction.

THE plaintiff in error was convicted in the Circuit Court of the United States for the Western District of Arkansas of the crime of murder, and sentenced to be hung. The circumstances of the homicide were substantially these: On the evening of July 17, 1891, there was a dance at the Valley House in Fort Gibson. A half brother of the defendant, named Walter Shannon, a boy about twelve years of age, was tending a soda-pop or confectionery stand in the room where the dance was going on. The deceased, Randle Lovely, who was quite drunk, took a bottle of soda-pop, drank it, and refused to pay for it. Some words passed between him and the boy, which resulted in his slapping the boy with his open hand. The boy turned to run

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away, and the deceased followed. Seeing the controversy, the defendant left his place in the dance, went after his pistol, took it out of the pocket of one Turner, with whom he had left it, came near to the deceased, and without a word shot him. The wounded man sank to the floor. The defendant turned and walked away, but in a few minutes returned, and, seeing Lovely lying on the floor, said: "I have pretty near killed him; I might as well finish him," put his pistol close to the head of the deceased and fired a second time. After that he turned around and walked off, and fled from Fort Gibson. The deceased was about thirty years of age, and the defendant eighteen.

The burden of the defence was that the homicide was manslaughter rather than murder. In the course of his charge, the judge instructed the jury as follows: "In order to give the party the right to claim that his act is manslaughter there must be a condition of hasty passion. That is one condition that alone cannot reduce the man's crime, because there is passion. It is sometimes hasty when a man slays in the most murderous way; there is a brutal passion, a wicked passion; the man's mind is abnormal; it is not natural; it is not in that placid condition where he contemplates the rights of others and observes these rights, but it is in a condition of fury. He frequently creates that condition by the use of stimulants, nerves himself up for the very purpose. When he does it, it won't do to say that the mind is in a condition of passion that will put a party in such an attitude that he is guilty alone of manslaughter. No; that act of passion must generate from some wrongful act being done by the party who is slain at the time that he does it, or so soon thereafter as that there was no time for the passion of the party to cool. That is what it means, and the offence is mitigated because of the wrongful act of the other party, who is committing that act at the time of slaying. Now, as I have already told you substantially, if the other party is doing a wrongful act at the time he is slain — and when I speak of a wrongful act I speak of one that would not give the party the right to defend to the death, and the slapping of the boy in this case, or the con-

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troversy he had with his brother, would not do that, because if violence of that character was done the defendant it wouldn't give him the right to slay, nor would it give him the right to slay him when it was used on his brother, though he has the same right as affecting his brother as affecting himself, because he has a right to defend his brother in any case where his life is imperilled, and use the same violence as he would in his own case. But suppose that during the time that condition existed, and the doing of the act has a tendency to infuriate the mind of the party, if he then, without previous preparation, or without preparation at that time, should take the life of the deceased, that would be manslaughter."

To this instruction the defendant excepted, and this exception is the only matter here relied upon by the plaintiff in error.

Mr. A. H. Garland, for plaintiff in error, cited *State* v. *Fitzsimmons*, 63 Iowa, 656; *State* v. *Abarr*, 39 Iowa, 185; *Irley* v. *State*, 32 Georgia, 496; *State* v. *Davis*, 1 Houst. Cr. Cas. (Del.) 13; *Stewart* v. *State*, 78 Alabama, 436.

Mr. Solicitor General for defendants in error.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

The facts of this case presented a proper question for the consideration of the jury, as to whether the homicide was murder or manslaughter. The instruction challenged did not, when taken in connection with the other parts of the charge, present the law inaccurately; for theretofore the judge had charged, substantially, that premeditation was necessary to the crime of murder; and also, quoting from some authority, that "voluntary manslaughter is the unlawful killing of another without malice, upon sudden quarrel, or in the heat of passion;" and, further, that "the law kindly appreciating the infirmities of human nature, extentuates the offence committed, and mercifully hesitates to put on the same footing

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of guilt the cool, deliberate act, and the result of hasty passion." In the language complained of, he goes on to say that mere passion does not reduce the crime from murder to manslaughter, for it may be a passion voluntarily created for the purpose of homicide; but it must spring from some wrongful act of the party slain at the time of the homicide, or so near theretofore as to give no time for passion to cool. Applying the rule to the facts in evidence, the instruction was that, if the defendant in a moment of passion, aroused by the wrongful treatment of his brother and without any previous preparation, did the shooting, the offence would be manslaughter and not murder; but as is immediately thereafter added, if he prepared himself to kill, and had a previous purpose to do so, then the mere fact of passion would not reduce the crime below murder.

We see nothing in this of which the defendant can properly complain, and as this is the only matter called to our attention, the judgment of the Circuit Court must be

Affirmed.

UNITED STATES v. PATTERSON.

APPEAL FROM THE COURT OF CLAIMS.

No. 951. Submitted October 20, 1893. — Decided October 30, 1893.

A commissioner of a Circuit Court of the United States is not entitled, under Rev. Stat. § 847, to compensation for hearing charges made by complaining witnesses against persons charged with violations of the laws of the United States, and holding examinations of such complaining witnesses and any other witnesses produced by them in support of their allegation, and deciding whether a warrant should not issue upon the complaint made.

Although such services are of a judicial nature, and may be required by the laws of the State in which they are rendered, they cannot be charged against the United States in the absence of a provision by Congress for their payment.

THIS was an appeal from a judgment of the Court of Claims, in favor of the claimant and against the United States. The

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claimant was a commissioner of the Circuit Court of the United States for the Western District of North Carolina, and as such commissioner performed certain services for the defendants, consisting, as stated in the findings, "of hearing charges made by complaining witnesses against persons charged with violations of the laws of the United States, and holding examinations of such complaining witnesses, and any other witnesses produced by them in support of their allegation, and deciding whether a warrant should not issue upon the complaint made." For such services that court held that he was entitled to compensation at the rate of five dollars per day, and rendered judgment accordingly.

Mr. Assistant Attorney General Dodge and *Mr. Charles C. Binney* for appellants.

Mr. William W. Dudley, *Mr. Louis T. Michener*, *Mr. Richard R. McMahon*, and *Mr. George A. King* for appellee.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

The single question presented by this record is whether the services described by the finding of the Court of Claims come within this clause of section 847 of the Revised Statutes: "For hearing and deciding on criminal charges, five dollars a day for the time necessarily employed." No opinion was filed by the Court of Claims, but the reasoning by which the majority of that court reached their conclusion seems from the briefs of counsel to have been as follows: Section 847 provides, generally, for the compensation of commissioners, some services named therein being of a clerical and some of a judicial nature. This section was considered by this court in *United States* v. *Jones*, 134 U. S. 483, and in the opinion therein, on pages 486 and 487, it was said: "The compensation of a commissioner is clearly prescribed and classified by section 847 of the Revised Statutes according to the character of the services performed. For acts purely clerical and ministerial, such as administering oaths, taking acknowledgments, taking and certifying depo-

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sitions to file, or furnishing a copy of the same, specific fees are provided, and for issuing writs or warrants or other services he has the same compensation as is allowed to clerks for like services. For acts not merely clerical, but which are performed by the commissioner in his judicial capacity, his fees are regulated on a basis of per diem compensation." These services were clearly not of a clerical, but of a judicial nature. It was held in the case of *United States* v. *Ewing*, 140 U. S. 142, that, in view of section 1014 of the Revised Statutes, the law of the State in which the services are rendered must be looked at, in order to determine what is necessary in the matter of procedure; and referring to the laws of the State of North Carolina these provisions are found:

"Code of North Carolina, Vol. 1, Sec. 1133. *Duty of magistrate on complaint being made to him of the commission of a crime.* — Whenever complaint shall be made to any such magistrate, that a criminal offence has been committed within this State, or without this State and within the United States, and that a person charged therewith is in this State, it shall be the duty of such magistrate to examine on oath the complainant and any witnesses who may be produced by him.

"Sec. 1134. *Duty of magistrate to issue his warrant for the arrest of the accused.* — If it shall appear from such examination that any criminal offence has been committed, the magistrate shall issue a proper warrant under his hand, with or without seal, reciting the accusation, and commanding the officer, to whom it shall be directed, forthwith to take the person accused of having committed such offence and to bring him before a magistrate, to be dealt with according to law."

Therefore, it is the duty of a commissioner, as of a committing magistrate of the State, to examine on oath the complainant and other witnesses, and, upon a consideration of such testimony, determine whether a crime has been committed, and this before issuing any warrant. It being his duty to render these services, and they being of a judicial nature, he is entitled to compensation therefor, and, by the rule laid down, on the basis of a per diem.

We are unable to concur in this reasoning. It may be con-

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ceded that the services thus described are of a judicial character, and that they are required by the laws of the State of North Carolina, though for that matter substantially the same practice exists elsewhere, and under most systems of criminal procedure; yet unless Congress has made specific provision for compensation for such services, none can be charged against the United States. The inquiry is never limited to the fact or the character of services, but always extends to the statutory authority for compensation. The latter being wanting, no recovery can be had. Now the clause in question, and this is the only clause that can be relied on, provides a per diem compensation "for hearing and deciding on criminal charges." A criminal charge, strictly speaking, exists only when a formal written complaint has been made against the accused and a prosecution initiated. It is true the popular understanding of the term is "accusation," and it is freely used with reference to all accusations, whether oral, in the newspapers, or otherwise; but in legal phraseology it is properly limited to such accusations as have taken shape in a prosecution. In the eyes of the law a person is charged with crime only when he is called upon in a legal proceeding to answer to such a charge. Mere investigation by prosecuting officers, or even the inquiry and consideration by examining magistrates of the propriety of initiating a prosecution, do not of themselves create a criminal charge. The hearing and deciding on a criminal charge is something which takes place only after the criminal charge has been legally made. In Bouvier's Law Dictionary (1 Bouv. p. 581) "Hearing" is thus defined: "The examination of a prisoner charged with a crime or misdemeanor and of the witnesses for the accused." In 9th American and English Encyclopædia of Law, p. 324, it is said to be "the preliminary examination of a prisoner charged with a crime and of witnesses for the prosecution and defence." See, also, Wharton's Criminal Pleadings and Practice, § 70.

The question presented in the *Jones case* was whether the hearing and deciding of motions with respect to bail, and for continuances in cases pending before the commissioner, was a hearing and deciding on criminal charges within the scope of

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that clause, and it was held that it was. But in that case the criminal charges had been made; that is, formal written complaints had been filed, warrants issued, the defendants arrested, and cases were pending, and the ruling was that any judicial action in such cases was hearing and deciding on criminal charges, and the general language of classification used in the opinion must be taken in connection with the facts as they existed and the question presented. It was not intended to hold that for every act of a judicial nature, any more than for every act of a clerical nature, a commissioner was entitled to compensation. His compensation is limited to those specific services for which Congress has provided compensation, and words and phrases of accepted meaning in legal phraseology must not, because they may be popularly used in a broader sense, be given, when found in a statute, that popular significance so as to enlarge the matters in respect to which compensation has been authorized and may be awarded. There is nothing in the case of *Counselman* v. *Hitchcock*, 142 U. S. 547, which militates against the views herein expressed. In that case a distinction was drawn between the terms "criminal case" in the Fifth Amendment to the Constitution, and "criminal prosecution" in the Sixth Amendment, and the former, for the protection of the citizen, given a broad construction, and so as to include investigations before a grand jury. The limitation placed upon the term "criminal prosecution" coincides with that here given to "criminal charges."

Our conclusion is that for these services, though of a judicial nature, performed before the filing of the formal written complaint and the arrest of the defendants, Congress has provided no compensation. Judgment will therefore be

Reversed, and the case remanded with instructions to render judgment for the United States.

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MAGONE *v.* HELLER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 47. Argued October 19, 20, 1893. — Decided October 30, 1893.

Under the tariff act of 1883, a kind of sulphate of potash, the only common use of which, either by itself or in combination with other materials, is as manure or in the manufacture of manure, is within the clause of the free list which exempts from duty "all substances expressly used for manure;" and is not within the clause of "Schedule A. — Chemical Products," which imposes a duty on "potash, sulphate of, twenty per centum ad valorem."

THIS was an action brought, after due protest and other proceedings, by the members of a firm of importers against the collector of the port of New York, to recover back duties assessed and levied by the collector under the tariff act of March 3, 1883, c. 121, upon three importations in 1887 of an article invoiced as "manure salts," which the collector held to come within the clause "Potash, sulphate of, twenty per centum ad valorem," in "Schedule A. — Chemical Products," and which the plaintiffs claimed to be exempt from duty under the free list as a substance "expressly used for manure." 22 Stat. 493, 515.

At the trial, one of the plaintiffs testified that the article (of which he produced samples) was a manure salt, made in Saxony, from a substance there mined and known as "kainit," by crushing and washing or leaching so as to extract the parts of no use as fertilizers, leaving sulphate of potash, and then burning and grinding it in a mill, but not calcining it; that the plaintiffs sold all the importations to manufacturers of fertilizers, and had imported the article since 1882; that, "so far as his knowledge went, similar articles were used expressly for fertilizers and manures; that his firm sold them to fertilizer manufacturers expressly;" that "he did not say that these articles were directly applied to the ground for crops; that they were so applied; but they were generally used in other ways;" that they contained 90 to 95 per cent of sul-

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phate of potash, and more than 40 per cent of pure potash; that the price was estimated according to the amount of sulphate of potash, as shown by foreign analysis; and that his firm dealt in manure salts, and not in sulphate of potash.

On cross examination, he persisted in the last statement, after being shown a business card of his firm (afterwards proved to have been obtained at their place of business a few days before the trial) which stated that they dealt in "sulphate of potash, muriates of potash, kainit, kieserit, mineral phosphates, acid phosphate, and all other fertilizing materials."

Several wholesale dealers in drugs and chemicals, called by the plaintiffs, testified that they knew and dealt in chemically pure sulphate of potash, (of which they produced samples,) but did not recognize or deal in the substance of which samples had been produced by the plaintiffs.

Some manufacturers of fertilizers and dealers in fertilizing materials, called by the plaintiffs, testified that this substance was bought and sold as "sulphate of potash," and as "manure salts;" that it was generally used in the manufacture of fertilizers, mixing it with other materials; that it was sometimes sold to farmers for fertilizing purposes; and that they did not know of its being used for any other purpose.

An analytic and consulting chemist, called by the plaintiffs, testified that the article "was known in commerce as high grade manure salt or high grade sulphate of potash;" "that he did not know the predominating name under which they were sold; that they were called sulphate of potash and high grade manure salt; that the term manure salt was applied to perhaps only three articles, kainit, sulphate of potash (so called) or the double sulphate of potash and magnesia, and muriate of potash and kieserit; that the articles in suit, as far as he knew, were generally used in the manufacture of fertilizers;" and that any of the chemicals used in fertilizers would not injure vegetation, if mixed with something else, or lightly sprinkled on the soil, but would if applied in large quantities.

The same witness testified that the article was also used in the manufacture of alum, and of nitrate of potash for making

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Counsel for Plaintiff in Error.

gunpowder; and witnesses called by the defendant testified that it was used for making alum, refined potash, and bichromate of potash.

An analytical chemist, called by the defendant, testified that he had made analyses of the samples produced by the plaintiff, showing that they contained from 49.19 per cent of potash and 91.05 per cent of sulphate of potash to 51.62 per cent of potash and 95.67 of sulphate of potash; that the chemical difference between these samples and those produced by the other witnesses for the plaintiffs was only in the degree of purity, the former containing a small amount of muriates; and that the two articles were two kinds of the same substance — sulphate of potash.

The defendant moved the court to direct the jury to return a verdict for the defendant, on these grounds: 1st. That the article in suit is provided for in the tariff act of 1883 *eo nomine* as "sulphate of potash." 2d. That the clause "all substances expressly used for manure" means only substances used for or as manure, and not substances used in the manufacture of manure or fertilizers. 3d. That this article is "sulphate of potash," and is provided for in said tariff act *eo nomine* as "sulphate of potash," a specific expression; and therefore, even if otherwise covered by the general expression "all substances expressly used for manure," is not provided for under such general expression. 4th. That the plaintiffs had not proved facts sufficient to enable them to recover. The court denied the motion, and the defendant excepted.

The defendant then moved the court to allow the case to go to the jury upon the question whether the article in suit was a "substance expressly used for manure." The court denied this motion also, and the defendant again excepted.

The jury returned a verdict for the plaintiffs by direction of the court. 38 Fed. Rep. 908. Judgment was rendered on the verdict, and the defendant, on October 16, 1886, sued out this writ of error.

Mr. Assistant Attorney General Whitney for plaintiff in error.

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Opinion of the Court.

Mr. Edwin B. Smith for defendants in error.

MR. JUSTICE GRAY, after stating the facts, delivered the opinion of the court.

The tariff act of 1883, in "Schedule A. — Chemical Products," imposes duties on various compounds of "Potash," including "Nitrate of, or saltpetre, crude, one cent per pound. Nitrate of, or refined saltpetre, one and one-half cents per pound. Sulphate of, twenty per centum ad valorem." "Bichromate of potash, three cents per pound." 22 Stat. 493.

Among the articles exempt from duty by the free list of the same act are the following: "Bone dust and bone ash for manufacture of phosphate and fertilizers. Carbon, animal, fit for fertilizing only. Guano, manures, and all substances expressly used for manure." 22 Stat. 515.

Congress, for the promotion of agriculture, evidently intended that if a substance, which might be described by the name of an article subject to duty under Schedule A, was within the description, in the free list, of use for fertilizing the ground, it should be exempt from duty.

This is manifest from the clause in the free list, immediately preceding that now in question, "Carbon, animal, fit for fertilizing only," as well as from the clause further on in the same list, "Phosphates, crude or native, for fertilizing purposes." 22 Stat. 517. Animal carbon and crude or native phosphates are both chemical products; yet if the carbon is "fit for fertilizing only," or the phosphate is "for fertilizing purposes," it is clearly intended to come in free, notwithstanding Schedule A imposes a duty on "all chemical compounds and salts, by whatever name known, and not specially enumerated or provided for in this act, twenty-five per centum ad valorem." 22 Stat. 494; *Mason* v. *Robertson*, 139 U. S. 624.

So, by force of the very clause in question, "all substances expressly used for manure," must be exempt from duty, even if they are chemical products, and are scientifically classed as

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one kind of an article the name of which appears in Schedule A, or are spoken of in commerce by that name. The agricultural use must prevail over the scientific or commercial nomenclature.

The real question, therefore, is what is the true meaning, in this clause, of the words "expressly used for manure?"

While the adverb "expressly," in its primary meaning, denotes precision of statement, as opposed to ambiguity, implication, or inference, and is equivalent to "in an express manner," or "in direct terms," it is also commonly used to designate purpose, and as equivalent to "especially," or "particularly," or "for a distinct purpose or object."

In Webster's Dictionary, for instance, the definition of "expressly" is: "In an express manner; in direct terms; with distinct purpose; particularly; as, a book written *expressly* for the young." And the further illustration is added from Shakespeare: "I am sent *expressly* to your lordship."

The phrase "substances expressly used for manure," was in the enumeration of articles specified as exempt from duty in earlier tariff acts, and may have been retained in the act of 1883 for that reason. See Acts of March 3, 1857, c. 98, § 3, 11 Stat. 194; March 2, 1861, c. 68, § 23, 12 Stat. 196; Rev. Stat. § 2505.

The qualifying words are not "expressly intended for use as manure," or "expressly imported for use as manure," or "in fact to be used as manure," and cannot therefore be tested by the intention of the importer, or by the use to which the goods are afterwards actually put. But the words are "expressly used for manure," and the question whether the imported articles come within the description is to be determined at the time of importation.

"Manures" having been already specified in the same clause, the words in question cannot be limited to substances used as manure in the very condition in which they are imported; but must, according to a natural meaning of the word "for," include not only all substances expressly used

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as manure, but also substances expressly used, either by themselves or in combination with other materials, in making manure.

The result of these considerations is that, in this act, the phrase "expressly used for manure" is equivalent to "used expressly," or "particularly," or "especially" for manure; and denotes those substances, the only common use of which, either by themselves, or in combination with other materials, is for the purpose of fertilizing the soil.

If the only common use of a substance is to be made into manure, or to be itself spread upon the land as manure, the fact that occasionally, or by way of experiment, it is used for a different purpose, will not take it out of the exemption. But if it is commonly, practically and profitably used for a different purpose, it cannot be considered as "expressly used for manure," even if in the majority of instances it is so used. To hold otherwise would be to extend to other industries an exemption intended for the benefit of agriculture only.

In the present case, the article imported was, chemically considered, "sulphate of potash," though not quite pure. There was testimony tending to show that it was bought and sold by that name, and as "manure salts," by manufacturers of fertilizers and dealers in fertilizing materials; that it was used expressly for fertilizers and manures; that it was generally used, mixed with other materials, for the manufacture of fertilizers; and that it was sometimes sold to farmers to be used as manure. But there was other testimony to the effect that it was also used in the manufacture of alum, as well as of refined potash, nitrate of potash, and bichromate of potash.

Such being the state of the case, it was a question of fact, to be determined by the jury, upon consideration of all the evidence and of the comparative credibility of the witnesses, whether the article was "expressly used for manure," in the sense above defined.

It follows that the judge rightly refused to direct a verdict for the defendant; but that he erred in denying the defend-

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ant's request to submit the case to the jury, and in directing a verdict for the plaintiffs. For this error

The judgment is reversed, and the case remanded, with directions to set aside the verdict and to order a new trial.

MR. JUSTICE BREWER dissented.

MR. JUSTICE BROWN was not present at the argument, and took no part in the decision.

HALL *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

No. 822. Submitted October 19, 1893. — Decided October 30, 1893.

Upon a trial for murder in Arkansas, on cross examination of witnesses to the defendant's character, and by his own testimony to meet evidence that he had since fled to Mississippi, it appeared that he had killed a negro in Mississippi two years before, and had since been tried and acquitted there. The district attorney, in his closing argument to the jury, said: "We know, from reading the newspapers and magazines, that trials in the State of Mississippi of a white man for killing a negro are farces. The defendant came from Mississippi with his hands stained with the blood of a negro." And he added other like expressions and declarations that the killing of a negro in Mississippi, for which the defendant had been tried and acquitted there, was murder. To all these declarations, expressions, and arguments of the district attorney, the defendant at the time objected, and, his objections being overruled by the court, alleged exceptions. *Held*, that he was entitled to a new trial.

THIS was an indictment, found at August term, 1891, of the Circuit Court for the Western District of Arkansas, against Robert M. Hall, for the murder of James Yates, by shooting him with a gun, at Choctaw Nation in the Indian country in that district, on August 4, 1891.

At the trial, at August term, 1892, before the District Judge,

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it was proved, and not denied, that the defendant, being then twenty-two years of age, shot and killed Yates at the time and place alleged, and that both were white men. The United States introduced evidence tending to show that the killing was murder; and that the defendant had come from Mississippi, and had been in the Indian country for about four months before the killing. The defendant introduced testimony tending to explain the circumstances of the killing, and to show that it was not murder.

The United States, against the defendant's objection and exception, were permitted by the court, for the purpose of showing that the defendant fled from the Indian country after killing Yates, to put in evidence a warrant issued by a United States judge in Mississippi, dated March 2, 1892, reciting the commitment of the defendant by a United States commissioner "upon the charge of murder on an indictment from the Circuit Court of the United States for the Western District of Arkansas," and ordering him to be taken and delivered to the United States marshal for this district.

Witnesses called by the defendant testified that his character as a peaceful and law-abiding man was good. On cross examination of these witnesses, the district attorney, against the defendant's objection and exception, was permitted by the court, for the purpose of testing their knowledge of his reputation, to ask them whether they had heard that he had killed a negro in Mississippi before he came to the Indian country. The only witness, who admitted that he had heard of the killing of the negro by the defendant, testified on reëxamination that he had also heard that he had been acquitted of it.

The defendant, having offered himself as a witness in his own behalf, testified that he went back to Mississippi to stand his trial there in a court of the State in February, 1892, upon a charge of murdering a negro whom he had killed there in August, 1889, and was thereupon arrested, tried and acquitted upon that charge; and that, immediately after killing the negro, he had left Mississippi by the advice of his father, with whom he then lived. This testimony was not objected to by the district attorney, nor changed on cross examination.

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Argument for Defendants in Error.

One exception taken by the defendant was stated in the bill of exceptions allowed by the court as follows:

"The district attorney, in his closing argument to the jury, made use of the following language: 'We know what kind of trials they have in the State of Mississippi of a white man for killing a negro. We know from reading the newspapers and magazines that such trials there are farces. We are not living in Egyptian darkness, but in the light of the nineteenth century. The defendant came from Mississippi with his hands stained with the blood of a negro, and went to the Indian country, and in less than four months had slain another man.' And other like expressions and declarations that the killing of a negro in Mississippi, for which the defendant had been tried and acquitted there, was murder. To all of which declarations, expressions, and arguments of the district attorney the defendant at the time objected; but his objections were by the court overruled, and the defendant at the time excepted."

The defendant was convicted of the murder of Yates, as charged in the indictment; and sued out this writ of error, under the act of March 3, 1891, c. 517, § 5. 26 Stat. 827.

Mr. A. H. Garland for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendants in error, to the point on which the case turns in this court, said: The court's reasons for allowing the district attorney to proceed are stated in its opinion on the motion for a new trial. The court held that it could take judicial notice of the fact or supposed fact that trials of white men in Mississippi for killing negroes are farces, and that counsel could properly allude to any historical fact or facts "generally recognized by everybody." The court states that defendant's counsel, in objecting to the remarks, admitted their historical character.

Upon an exception to a ruling on a motion to check argument of counsel, the right of review is to be exercised but cautiously, when there is an abuse of discretion, and when it is probable that the jury have been misled. 1 Thompson on Trials, § 964, and cases cited.

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Argument for Defendants in Error.

It is now settled in this court, (*Wilson* v. *United States*, 149 U. S. 60, 67, 68,) in accordance with the general, though not universal, rule elsewhere, that such an exception lies. But the court has recognized that by opening the gate wide to such appeals "a new element of uncertainty would be introduced into the administration of justice in a criminal case." *Hopt* v. *Utah*, 120 U. S. 430, 442.

In Texas it is settled that the exception will not be noticed except when the court has subsequently refused to instruct the jury to disregard the improper remarks. *Young* v. *State*, 19 Tex. App. 536; *Comer* v. *State*, 20 S. W. Rep. 547. See also *Thompson* v. *Barkley*, 27 Penn. St. 263; *State* v. *Hamilton*, 55 Missouri, 520; *State* v. *Brooks*, 92 Missouri, 542; *Combs* v. *The State*, 75 Indiana, 215; *Shular* v. *The State*, 105 Indiana, 289; *Cross* v. *The State*, 68 Alabama, 476; *Scripps* v. *Reilly*, 35 Michigan, 371; *Pierson* v. *The State*, 18 Tex. App. 524.

The district attorney, in commenting on the method of trial in the State of Mississippi, did not profess to inform the jury as to any fact, but to remind them of what he considered a matter of current notoriety through newspapers and magazines. The remarks were of a kind familiar to every summing up in a criminal case. The jury can hardly have estimated them at more than their true value. The case is somewhat similar to that of *The State* v. *Stark*, 72 Missouri, 37, where counsel stated that "defendant had gone to the Indian Territory, where all rascals go." The court on appeal said: "Defendant in his own testimony states that he went there. The additional words 'where all rascals go,' whether true or false, could certainly have had no effect upon the jury."

The exception, however, is not specifically directed against the remark of the district attorney concerning the method of trials in Mississippi. It is a general exception directed to four sentences, and if any of these sentences contain correct propositions, the exception is valueless according to authorities already cited. The last proposition that "defendant came from Mississippi with hands stained with the blood of a negro," etc., was true and proper enough for the district attorney to include in his summing up, whether defendant, when he killed

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the negro, was guilty of murder or manslaughter, or was justified by the right of self-defence. The fact that he had been engaged in such broils is one which the jury cannot possibly have overlooked in considering his true character as developed on this trial.

MR. JUSTICE GRAY, after stating the facts, delivered the opinion of the court.

The defendant was on trial for killing Yates in Arkansas in 1891, and not for killing a negro in Mississippi two years before. Evidence as to his killing the negro and his arrest and trial therefor in Mississippi was introduced for two purposes only: first, by the district attorney, to test the knowledge of the witnesses to the defendant's character; and afterwards by the defendant himself, to show that his return to Mississippi after the killing of Yates had another object than to flee from justice.

If the defendant had murdered the negro in Mississippi, and had been there convicted therefor, evidence, either of the murder, or of the conviction, would have been incompetent to support the indictment against him for the murder of Yates in Arkansas. *Boyd* v. *United States*, 142 U. S. 450, 458. But it was testified by the defendant, and assumed by the district attorney, that the defendant had been acquitted of the charge of murdering the negro; and it was not objected that the record of the acquittal should have been produced.

The district attorney, in his closing argument to the jury, insisted that, from reading the newspapers and magazines, we know trials in the State of Mississippi of a white man for killing a negro to be farces; that the defendant came to the Indian country from Mississippi "with his hands stained with the blood of a negro;" and that "the killing of a negro in Mississippi, for which the defendant had been tried and acquitted there, was murder." The defendant instantly objected to all these declarations, expressions, and arguments of the district attorney; and excepted to the action of the court in overruling his objections.

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The ground on which the presiding judge, in the opinion delivered on overruling a motion for a new trial, (contained in the record, and cited by the attorney for the United States in this court,) justified his own action and that of the district attorney in this regard, was that "it is unquestionably a sound rule that historical facts, of which courts take judicial notice, may be alluded to in argument for the purpose of illustration," and that he considered it "a historical fact in this country" that in Mississippi the trial and acquittal of a white man for the killing of a negro is a farce.

Whether or not such is the condition of things in that State is a matter of personal belief and opinion rather than of unquestioned historical fact. It is hard to see how the fact, if admitted, that in a certain locality all persons indicted for crimes or offences of a certain class are acquitted, has any tendency to prove that every person, or any particular person, there indicted for such a crime or offence, is guilty.

But the district attorney did not content himself with alluding to the supposed fact by way of illustration. He relied upon it, and upon his inference therefrom that the defendant's hands were stained with the blood of the negro, and other like expressions and declarations of his own, to establish that "the killing of a negro in Mississippi, for which the defendant had been tried and acquitted there, was murder." This whole branch of his argument was evidently calculated and intended to persuade the jury that the defendant had murdered one man in Mississippi, and should therefore be convicted of murdering another man in Arkansas.

The attempt of the prosecuting officer of the United States to induce the jury to assume, without any evidence thereof, the defendant's guilt of a crime of which he had been judicially acquitted, as a ground for convicting him of a distinct and independent crime for which he was being tried, was a breach of professional and official duty, which, upon the defendant's protest, should have been rebuked by the court, and the jury directed to allow it no weight.

The presiding judge, by declining to interpose, notwithstanding the defendant's protest against this course of argument,

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gave the jury to understand that they might properly and lawfully be influenced by it; and thereby committed a grave error, manifestly tending to prejudice the defendant with the jury, and which, therefore, was a proper subject of exception, and, having been duly excepted to, entitles him to a new trial. *Wilson* v. *United States*, 149 U. S. 60, 67, 68.

The instructions given to the jury upon other subjects may not take the same shape upon another trial, and need not be considered.

Judgment reversed, and case remanded, with directions to set aside the verdict and to order a new trial.

BUSHNELL *v.* CROOKE MINING AND SMELTING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 195 of October Term, 1892. Submitted October 23, 1893. — Decided October 30, 1893.

An application for a rehearing cannot be entertained when presented after the expiration of the term at which the judgment was rendered.

THIS was an application for leave to file a petition for a rehearing of a case decided at October term, 1892. The petition was supported by the following affidavit, entitled in the cause.

"A. R. Bushnell being duly sworn on oath, says that he is attorney for himself and coplaintiffs in error in the above entitled cause, and had exclusive charge of the conduct of the same in said court; that the decision therein, dismissing the writ for want of jurisdiction, was rendered April 17, 1893, and immediately on being informed thereof by letter from the clerk of said court, which he received as soon thereafter as it could be sent by due course of mail, with a view to filing a petition for a rehearing in said cause under the rules, he made inquiry of attorneys more familiar than himself with the usual time of the final adjournment of the annual terms

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of said court, and was by them informed that such adjournment of the then October term, 1892, of said court could not surely be expected that spring, and that they understood the practice of the court to be to take a summer recess, and that such final adjournment would not be reached until this fall, and not long before the beginning of the October term, 1893, of said court; that thereupon he immediately procured a copy of the opinion in said cause and began the preparation of a petition on behalf of the plaintiffs in error for a rehearing therein, but relying upon such information, did not press the same to completion in time to be filed by May 15, 1893, when he is informed such final adjournment of said October term, 1892, of said court was actually had; and he says that his failure to file such petition for a rehearing in said cause before such final adjournment, was wholly owing to his mistake as to the time when the same would take place, made through such misinformation; and he verily believes that leave being given him to file such petition, such rehearing of said cause ought to be granted by the court.

"A. R. BUSHNELL.

"Subscribed and sworn to this 29th day of September, 1893, before me.

"F. M. STEWART,

"*Clerk of U. S. Courts for said District.*"

THE CHIEF JUSTICE: We should not have been called on to reiterate the rule that an application for a rehearing cannot be entertained when presented after the expiration of the term at which the judgment was rendered. *Hudson* v. *Guestier*, 7 Cranch, 1; *Browder* v. *M'Arthur*, 7 Wheat. 58; *Sibbald* v. *United States*, 12 Pet. 488; *Brooks* v. *Railroad Company*, 102 U. S. 107; *Williams* v. *Conger*, 131 U. S. 390.

Application denied.

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WELLS *v.* GOODNOW'S ADMINISTRATOR.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 160. Submitted October 10, 1893. — Decided October 16, 1893.

This case is dismissed upon the authority of *Chapman* v. *Goodnow's Administrator*, 123 U. S. 540.

MOTION TO DISMISS. This action was commenced in the Supreme Court of Iowa to recover taxes that had been paid by the Iowa Homestead Company while in possession and occupancy of land in Iowa, which was afterwards adjudged to have been at that time the property of the defendant. Judgment in the trial court for the plaintiff which was affirmed by the Supreme Court of the State on appeal. In announcing its judgment that court said: "The facts in this case are the same as in *Goodnow* v. *Stryker*, 61 Iowa, 261, and following that case the judgment of the District Court must be affirmed. There are members of the court who think the cited case was incorrectly decided, but under the well-settled rule of *stare decisis* they think we must adhere thereto, especially so because of the many peculiar facts and many cases which have been determined by the court based on the subject-matter upon which this action is grounded." The defendant below thereupon sued out a writ of error to this court, which writ the defendant in error moved to dismiss on the ground that no Federal question was involved.

Mr. George Crane for the motion.

Mr. C. H. Gatch and *Mr. William Connor* opposing.

THE CHIEF JUSTICE: The writ of error is dismissed for the want of jurisdiction upon the authority of *Chapman* v. *Goodnow*, 123 U. S. 540.

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SCHUYLER NATIONAL BANK v. BOLLONG.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 518. Argued October 17, 1893. — Decided October 30, 1893.

In order to maintain a writ of error against a judgment of the highest court of a State, it must appear that the judgment involved a decision against a right, title, privilege, or immunity claimed by the plaintiff in error under the Constitution or laws of the United States, which was specially set up or claimed in the state court at the proper time and in the proper way; and, as the record in this case does not show such facts, the writ of error is dismissed without intimating any opinion upon the questions sought to be raised here.

THIS was an action brought by Hector C. Bollong against the Schuyler National Bank, a corporation located and doing business in Colfax County, Nebraska, in the District Court of that county, to recover the penalties imposed by the statutes of the United States for knowingly contracting for and receiving usurious interest. The original petition or complaint was filed March 19, 1887, and the judgment recovered thereon was reversed by the state Supreme Court and the cause remanded, (*Schuyler Bank* v. *Bollong*, 24 Nebraska, 821,) whereupon on January 11, 1889, Bollong filed by leave of court his amended petition containing thirty-one counts. The defendant submitted several preliminary motions, which were overruled and exception taken, and among them one to dismiss the action upon the grounds:

"First. That this court has no jurisdiction to try and determine the subject-matter of the above-entitled action.

"Second. That exclusive jurisdiction is by the laws of the United States, to wit, section 711 of the Revised Statutes of the United States, vested in the courts of the United States to try and determine the subject-matter of the above-entitled action."

The motions having been disposed of, the defendant answered, denying all the material allegations of the petition and pleading in addition the limitation of two years provided

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by Congress for actions of this character. Issues being joined, a jury was waived and the cause was submitted to the court for trial. The defendant objected "to the introduction of any evidence under this petition on the ground that it does not state grounds sufficient to constitute a cause of action," and the objection being overruled, excepted.

The court made findings of fact and conclusions of law to which the defendant filed exceptions, and also a motion for new trial, which were severally overruled and exception taken. Judgment was thereupon rendered against the bank for $1601.84, and costs.

The fifth ground assigned for a new trial was: "That the court erred in admitting any evidence to sustain the allegations of the amended petition, for that the said petition states no facts sufficient to constitute a cause of action."

The bank then brought its petition in error in the state Supreme Court, setting forth among other grounds the following: "Eighteenth. That the findings and decision of the court herein are contrary to law. Nineteenth. That the court erred in finding that the allegations of the said amended petition are sustained by sufficient evidence. Twentieth. That the court erred in overruling the motion for a new trial made by the plaintiff in error."

The Supreme Court held that the state courts had jurisdiction in this class of cases; that the questions of law involved had been decided in *Schuyler Bank* v. *Bollong*, 24 Nebraska, 821, 825; that the findings of facts were amply sustained by the evidence; and affirmed the judgment. The opinion will be found in 32 Nebraska, 70. The case having been brought to this court by writ of error, the following errors were assigned in the brief of counsel, and argued at the bar:

"I. The complaint of the plaintiff below is fatally defective in that it contains no averment negativing the exception of section 5197, Revised Statutes United States, viz.: 'except that where by the laws of any State a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title.'

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"II. The complaint of the plaintiff below contains no allegation of the rate of interest allowed, in any case, by the laws of the State of Nebraska. Without such allegation, the averment that the interest charged by the defendant below 'was at a rate of interest greater than is allowed by the laws of the State of Nebraska,' is wholly insufficient to support this action under said section 5197.

"III. That the supposed causes of action are alleged to have accrued to the plaintiff below by force of section 5198 of the Revised Statutes of the United States; whereas the same accrued, if at all, under and by force of sections 5197 and 5198 of the Revised Statutes, and not by force alone of section 5198, as alleged.

"IV. That there is a fatal variance between the allegations of the complaint of the plaintiff below and the requirements of the said sections of the Revised Statutes.

"V. That there is no allegation in either of the counts or causes of action to the petition that the indebtedness of the plaintiff below to the bank, as therein specified, has been paid; and for aught alleged the several transactions complained of are still *in fieri*.

"VI. That there are other manifest and fatal errors appearing on the face of the petition of the plaintiff below that will be specified in the argument."

Mr. J. G. Bigelow, (with whom was *Mr. William Twombly* on the brief,) for plaintiff in error.

Mr. C. T. Phelps, *Mr. J. A. Grimison* and *Mr. C. O. Sabin* filed a brief for defendant in error, but the court did not call upon them.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

In view of the provisions of section 5198 of the Revised Statutes, as corrected by the act of February 18, 1875, 18 Stat. 316, 320, c. 80; the proviso of the fourth section of the act of July 12, 1882, 22 Stat. 162, 163, c. 290, and the decision

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of this court in *First National Bank of Charlotte* v. *Morgan*, 132 U. S. 141, counsel properly limited his assignment of errors to the matters specified, and does not now seek to rest the jurisdiction of the court upon any other ground than may be involved therein. And it is not contended that the writ of error can be maintained except upon the theory that the decision of the state court was against some title, right, privilege, or immunity claimed by plaintiff in error under the statutes of the United States. But by the requirements to the exercise of our jurisdiction of section 709 of the Revised Statutes, the title, right, privilege, or immunity thus relied on must be specially set up or claimed in the state court at the proper time and in the proper way. The decision must be against the title, right, privilege, or immunity so set up or claimed. *Spies* v. *Illinois*, 123 U. S. 131; *Brooks* v. *Missouri*, 124 U. S. 394; *Chappell* v. *Bradshaw*, 128 U. S. 132; *Texas & Pacific Railway* v. *Southern Pacific Co.*, 137 U. S. 48.

The errors assigned are in substance that the complaint or petition was fatally defective, in that it contained no averment negativing the exception of section 5197 of the Revised Statutes, under which national banks might charge the rate of interest permitted to banks of issue organized under state laws; in that it contained no allegation of the rate of interest allowed in any case by such state laws; in that the supposed causes of action were alleged to have accrued by force of section 5198 of the Revised Statutes, whereas they accrued, if at all, under and by force of sections 5197 and 5198 taken together; in that there was a fatal variance between the allegations of the complaint and the requirements of said sections; and in that there was no allegation in either of the counts that the indebtedness of plaintiff below had been paid; and in support of these alleged errors many considerations were urged in argument here, in respect of which, however, counsel observed that "none of the considerations herein presented to the court against the sufficiency of the complaint or petition of the plaintiff below were called to the attention of the Supreme Court of Nebraska."

Yet it is urged that the bank had contended at every stage

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of the litigation that the trial court had no power to proceed to judgment against it under sections 5197 and 5198, because of the want of averment in the petition of facts essential to give such jurisdiction, and hence that the bank must be held to have specially set up or claimed the title, right, privilege, and immunity under said sections to be exempt from liability to the plaintiff below for any matter or thing alleged in his complaint. But we are unable to accede to this view. The case was necessarily tried in accordance with the procedure and practice prescribed by the Code of Civil Procedure of Nebraska. That provided a form of action to be called a civil action, and to be commenced by the filing of a petition and the issue of summons thereon; what the petition must contain; that the pleadings should be liberally construed; that redundant matter might be stricken out and the allegations of a pleading required to be made definite and certain by amendment when necessary; that neither presumptions of law nor matters of which judicial notice is taken need be stated in the pleading; that amendments in furtherance of justice might be made before or after judgment; that the court should disregard errors or defects in the pleadings or proceedings not affecting the substantial rights of the adverse party, and that by reason of such error or defect no judgment should be reversed or affected; for the assignment of grounds for a new trial, including that the verdict, report, or decision was not sustained by sufficient evidence, or was contrary to law, and for error of law occurring at the trial and excepted to. (§§ 2; 62; 92; 121; 125; 136; 144; 145; 314; Comp. Stat. Neb. 1887, pp. 741, 748, 753, 756, 758, 759, 779.)

The questions raised upon the pleadings were disposed of by the Supreme Court in accordance with these provisions and the jurisprudence of the State in that regard, and there is nothing whatever to indicate that in passing upon the technical sufficiency of the complaint its attention was invited to the proposition that by its judgment thereon it might be depriving the defendant below of some title, right, privilege, or immunity arising in virtue of the sections under which the liability accrued.

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Names of Counsel.

It is true that the jurisdiction of the trial court was objected to, but that was on the confessedly untenable ground that the courts of the United States had exclusive jurisdiction in this class of cases, and therefore that the state courts had no jurisdiction over the subject-matter, but no such contention as that before us was suggested.

This being so, without intending in any degree to intimate that the determination by the state courts that the petition was sufficient might have presented a question revisable by this court, we must direct the writ of error to be

Dismissed.

MR. JUSTICE BROWN did not sit in this case, and took no part in its decision.

No. 38. SCHUYLER NATIONAL BANK *v.* BOLLONG. No. 39. SCHUYLER NATIONAL BANK *v.* BOLLONG. No. 317. SCHUYLER NATIONAL BANK *v.* BOLLONG. Error to the Supreme Court of Nebraska. Argued with No. 518, October 17, 1893. — Decided October 30, 1893. MR. CHIEF JUSTICE FULLER: These cases were submitted at the same time with *Schuyler National Bank* v. *Hector C. Bollong*, just decided, and must be disposed of in the same way.

Writs of error dismissed.

Mr. J. G. Bigelow, (with whom was *Mr. William Twombly* on the brief,) for plaintiffs in error.

Mr. C. T. Phelps, *Mr. J. A. Grimison* and *Mr. C. O. Sabin* filed briefs for defendants in error; but the court did not call upon them.

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HOLDER v. UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

No. 826. Submitted October 20, 1893. — Decided October 30, 1893.

The question of excluding a witness, pending the testimony of other witnesses in a trial for murder, is within the discretion of the trial court; but if a witness disobeys the order of withdrawal, he is not thereby disqualified, but may be proceeded against for contempt, and his testimony is open to comment to the jury by reason of his conduct.

A general exception to a charge, which does not direct the attention of the court to the particular portions of it to which objection is made, raises no question for review.

The denial of a motion for a new trial cannot be assigned for error.

THE case is stated in the opinion.

No appearance for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendants in error.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

Holder was convicted of the murder of one Bickford, in the Choctaw Nation, on December 24, 1891. Upon the trial three exceptions were saved, namely: to the overruling of objections to the testimony of a witness who had been present during the examination of the other witnesses in disobedience of an order of court on that subject; to the entire charge of the court; and to the denial of a motion for a new trial.

1. It seems that the court directed the witnesses, except the one under examination, to be excluded from the court-room, and that John Bickford, an uncle of the deceased, remained notwithstanding, but that no objection on that ground was made to Bickford testifying until after he had done so, other evidence had intervened, and he was recalled to testify in rela-

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tion to the turning over to him by the United States marshal of some personal property of the deceased.

It was then objected that he had heard the testimony of the other witnesses in disregard of the direction of the court in that behalf, and the objection was overruled.

Upon the motion or suggestion of either party, such a direction as that in question is usually given. If a witness disobeys the order of withdrawal, while he may be proceeded against for contempt and his testimony is open to comment to the jury by reason of his conduct, he is not thereby disqualified, and the weight of authority is that he cannot be excluded on that ground merely, although the right to exclude under particular circumstances may be supported as within the sound discretion of the trial court. 1 Greenl. Ev. (15th ed.) § 432, and cases cited; *Chandler* v. *Horn*, 2 Moody & Rob. 423; *Rex* v. *Colley*, Moody & Malkin, 329; *Bulliner* v. *People*, 95 Illinois, 394; *State* v. *Ward*, 61 Vermont, 153, 179; *Laughlin* v. *State*, 18 Ohio, 99; *Wilson* v. *State*, 52 Alabama, 299; *Lassiter* v. *State*, 67 Georgia, 739; *Smith* v. *State*, 4 Lea, (Tenn.,) 428; *Hubbard* v. *Hubbard*, 7 Oregon, 42. Clearly, the action of the court in admitting the testimony will not ordinarily be open to revision. Tested by these principles, the exception under consideration cannot be sustained.

2. There is no pretence that the charge of the court, occupying twenty-four pages of the printed record, was erroneous in every part, and no exception to any particular part is shown. The rule is that a general exception to a charge, which does not direct the attention of the court to the particular portions of it to which objection is made, raises no question for review. *Burton* v. *West Jersey Ferry Co.*, 114 U. S. 474; *Chateaugay Ore & Iron Co.* v. *Blake*, 144 U. S. 476, 488; *Lewis* v. *United States*, 146 U. S. 370.

3. It has also been settled by a long line of decisions of this court that the denial of a motion for new trial cannot be assigned for error. As observed by Mr. Justice Lamar, in *Van Stone* v. *Stillwell & Bierce Mfg. Co.*, 142 U. S. 128, 134, no authorities need be cited in support of the proposition.

Judgment affirmed.

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BROWN v. UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

No. 758. Submitted October 19, 1893. — Decided November 6, 1893.

The ruling in *Logan* v. *United States*, 144 U. S. 263, that, "upon an indictment for conspiracy, acts or declarations of one conspirator, made after the conspiracy has ended, or not in furtherance of the conspiracy, are not admissible in evidence against the other conspirators," affirmed and followed.

THE case is stated in the opinion.

Mr. A. H. Garland for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendants in error.

MR. JUSTICE JACKSON delivered the opinion of the court.

John Brown, the plaintiff in error, was indicted and convicted for the murder of Josiah Poorboy and Thomas Whitehead, on December 8, 1891, at the Cherokee Nation in the Indian Territory, and on April 30, 1892, was sentenced to be hanged.

It appears from the record that Poorboy and Whitehead were deputy marshals who had been trying to arrest James Craig, an escaped prisoner, for whose apprehension a small reward had been offered, and who was the co-respondent in a suit brought by Brown Hitchcock against his wife for divorce on the ground of adultery.

On the night of the murder, the plaintiff in error with John Roach and Wacoo Hampton, an escaped convict, were at the house of Mrs. Hitchcock, and at her request started out to find Craig. They did not succeed, and on their way back Hampton, who had gone on a short distance ahead, stopped in front of the house of Shirley, where it was known White-

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head was staying, and called out for Whitehead. The latter came out accompanied with Poorboy, both being armed. As they appeared Wacoo Hampton rode off, and about the time the marshals reached the roadway Roach and the plaintiff in error, mounted on one horse, rode up. Whitehead asked if either of them was Matthew Craig, a brother of James Craig, and when he was told no, he said he "would arrest them anyhow," and told them to get off the horse and lay down their guns. They dismounted, and Roach laid his gun down on the ground. As he straightened up, some one fired and the shot struck him in the arm. He then ran away, but Wacoo Hampton returned, and a shooting affray ensued. The proof tended strongly to establish the fact that the plaintiff in error killed Whitehead, but as to whether he or Wacoo Hampton killed Poorboy the testimony was inconclusive. A few days after the murder Hampton, who resisted arrest, was killed.

Among the assignments of error specially relied on, and which is apparently well taken, is the seventh assignment. As presented in the record by the plaintiff in error, it is claimed that the court charged the jury that "if self-defence does not exist, the only other condition that can exist in the case is a state of murder." This charge would have been clearly erroneous, but, by reference to the charge of the court itself, it appears that the assignment of error omits a material part of the charge. What the court really said was this: "I give you the law of manslaughter because it has been invoked in the case, and you are to see whether it exists; and because you may apply the doctrine of exclusion to enable you to come to the conclusion as to whether murder exists or not, because, if self-defence does not exist, *and if manslaughter does not exist*, the only other condition that can exist in the case is a state of murder. Manslaughter is the wilful and unlawful killing of a human being without malice aforethought, and it occupies a midway position between a state of case where the law of self-defence would apply and a state of case where the law defining murder applies." This language and what was said in other parts of the charge upon the subject of manslaughter, as set out in the record, is not open to exception.

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It is next insisted, on behalf of the plaintiff in error, that the court erred in refusing to give the following instruction, which was asked for the defendant:

"1. Manslaughter is an unlawful and wilful killing, but without malice, and is punishable by imprisonment not exceeding ten years and fine not exceeding one thousand dollars.

"2. If you believe, from the evidence in this case, that the deceased were attempting to make an illegal arrest of the defendant, and that the defendant, in resisting such illegal arrest, either by himself or in conjunction with his companions, killed the deceased, one or both, then the attempt to illegally arrest the defendant would be such a provocation as would reduce the offence to manslaughter, though the killing was done with a deadly weapon."

This was refused because the court had already fully instructed upon the subject of manslaughter, and by reference to the record it appears that the charge as given, which defined manslaughter to be "the wilful and unlawful killing of a human being *without malice aforethought*," was more accurate than the instruction asked for, which omitted the element of the killing being without any malice either express or implied. After what the court had said, and in the form presented, we think this instruction was properly refused.

The remaining point to be considered is covered by several assignments, which charge error in the court below in admitting testimony of subsequent declarations or statements of one party tending to show that there was a conspiracy to commit murder, and in charging the jury on that subject.

It appears in the evidence that while on their mission to find Craig, Wacoo Hampton said to Roach and the plaintiff in error that he intended to kill Brown Hitchcock, the husband of Mrs. Annie Hitchcock, with whom she had quarrelled on account of the suit for divorce which her husband was prosecuting. It was claimed on the part of the government that this statement of Wacoo Hampton showed a conspiracy to commit an unlawful act, and while engaged in this unlawful enterprise the murder of Poorboy and Whitehead was perpetrated. Roach, who was wounded on the night of the

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murder and was taken to the house of Mrs. Hitchcock, remained there all night. On the following morning Sullivan, a witness for the government, and his step-son were riding by the house of Mrs. Hitchcock, and saw her on the porch. He thought she called to him, and he stopped his horse, but she told him not to come in. She said she wanted his step-son. The young man went into the house, and remained there four or five minutes.

In offering this evidence the district attorney said that he proposed to show a conspiracy between Mrs. Hitchcock, the plaintiff in error, Wacoo Hampton and Roach to kill Brown Hitchcock; that she was primarily responsible for the murder, and that they went by her direction on that evening for the purpose of committing murder. The district attorney assumed that she did not want Sullivan to come into her house, because Roach was there. The counsel for the plaintiff in error strenuously objected to the admission of the testimony of Sullivan as to what Mrs. Hitchcock said, on the ground that, even if she were a co-conspirator, her statements and declarations, made after the killing, were not competent against the plaintiff in error. The court held that the witness might testify as to what Mrs. Hitchcock said as tending to establish the conspiracy. On the subject of conspiracy the court in its charge said:

"You are to look at it as the motive power which may point to the act done, only by circumstances, such as association of the parties together, such as their being connected together at the time of the doing of the act, such as their association after the act, such as their declaration as to their participation in the act. All these things may be taken into consideration by you for the purpose of showing the existence of conspiracy, of an unlawful understanding to commit the act that was a crime, that was an act of murder."

And in that connection the jury were further instructed that:

"If the defendant was on an unlawful mission, if he had entered into an understanding to kill Hitchcock, or if he had entered into an understanding to assist others in resisting

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arrest, or resisted an arrest that could properly be made, he was entering upon the commission of an act where there was a purpose to do an unlawful act, and he would be in the wrong; he would be entering upon a state of case that he had no right to enter upon.

"If the defendant was travelling with Wacoo Hampton for the purpose of preventing his being arrested, prompted by a determination to resist efforts to arrest him, then he was in the wrong; he had entered upon the performance of an unlawful enterprise of a character that might result in death, an enterprise that was unlawful under the law, because Wacoo Hampton had no right to resist arrest. It was his duty to submit to arrest at the hand of any officer or any citizen, and whoever engaged in criminal purpose to assist him in resisting that arrest had entered upon the execution of a wrongful act of [such] a character that, if the arrest was attempted to be executed and resistance offered, it might result in death; and when parties agree to enter upon a common criminal enterprise of that kind, of the kind that as the direct result of its execution death may be the consequence, and the party or parties killed were seeking to make the arrest in the proper way of another than the defendant in this case, killed by Hampton, for example, the act of Hampton in killing was the act of this defendant, because, it is an act that would naturally, reasonably, and probably grow out of the resistance to the arrest offered or agreed to be offered. . . . If there was a design upon the part of this defendant to assist Wacoo Hampton in resisting that arrest, and in the resistance offered to it these two men were killed, the act of killing would be the act of the defendant, and the act of killing would be an act of murder upon the part of all who participated in it, of all who entered into the unlawful agreement to resist arrest, and who were present at the execution of that unlawful agreement which resulted in the death of the parties."

Considered in connection with these instructions, the court improperly admitted the testimony, as to what Mrs. Hitchcock said after the killing, as evidence tending to establish a conspiracy between the plaintiff in error and herself and others to

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kill her husband. It was furthermore objectionable because there was no evidence in the case tending to show that the defendant, or his alleged co-conspirators, killed either of the deceased under the mistaken supposition that either one of them was Hitchcock. In the admission of the statements and declarations of Mrs. Hitchcock the court assumed that the acts and declarations of one co-conspirator, after the completion or abandonment of a criminal enterprise, constituted proof against the defendant of the existence of the conspiracy. This is not a sound proposition of law.

In *Logan* v. *United States*, 144 U. S. 263, 309, Mr. Justice Gray, speaking for the court, said: "The court went too far in admitting testimony on the general question of conspiracy. Doubtless in all cases of conspiracy, the act of one conspirator in the prosecution of the enterprise is considered the act of all, and is evidence against all. *United States* v. *Gooding*, 12 Wheat. 460, 469. But only those acts and declarations are admissible under this rule which are done and made while the conspiracy is pending, and in furtherance of its object. After the conspiracy has come to an end, whether by success or by failure, the admissions of one conspirator by way of narrative of past facts, are not admissible in evidence against the others. 1 Greenl. Ev. § 111; 3 Greenl. Ev. § 94; *State* v. *Dean*, 13 Iredell, 63; *Patton* v. *State*, 6 Ohio St. 467; *State* v. *Thibeau*, 30 Vermont, 100; *State* v. *Larkin*, 49 N. H. 39; *Heine* v. *Commonwealth*, 91 Penn. St. 145; *Davis* v. *State*, 9 Tex. App. 363." The same proposition is stated in the following authorities: *People* v. *Davis*, 56 N. Y. 95, 103; *New York Guaranty & Indemnity Co.* v. *Gleason*, 78 N. Y. 503; *People* v. *McQuade*, 110 N. Y. 284, 307; also Wharton, Crim. Ev. (9th ed.) § 699.

Tested by the rule laid down in these cases, the acts and declarations of Mrs. Hitchcock, on the morning after the killing, were not competent evidence against the plaintiff in error, of the existence of any conspiracy on his part, to kill her husband, or to resist the arrest of Hampton, or to commit any other unlawful act, such as the court instructed the jury would render him responsible for the acts done by his associates while engaged in a criminal enterprise. If a conspiracy was sought

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to be established affecting the plaintiff in error, it would have to be by testimony introduced in the regular way, so as to give the accused the opportunity to cross-examine the witness or witnesses. It could not be established by acts or statements of others directly admitting such a conspiracy, or by any statement of theirs from which it might be inferred.

The case having to be reversed for this error, it is not deemed necessary to consider the other assignments relating to matters which may not occur upon another trial.

For the erroneous action of the court below in improperly admitting the testimony of Sullivan as to what Mrs. Hitchcock said after the killing, as evidence tending to show a conspiracy, and in charging the jury that the declarations of a party or parties as to their participation in the criminal act were competent evidence of the conspiracy, as against the plaintiff in error, the judgment of the court below must be

Reversed, and the cause remanded to the Circuit Court of the United States for the Western District of Arkansas, with direction to set aside the judgment, and award plaintiff in error a new trial, and it is accordingly so ordered.

WAGER v. PROVIDENCE INSURANCE COMPANY.

PROVIDENCE INSURANCE COMPANY v. MORSE.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

Nos. 41, 49. Argued October 18, 1893. — Decided November 6, 1893.

Where a bill of lading provides that in case of loss the carrier, if liable for the loss, shall have the benefit of any insurance that may have been effected on the goods, this provision limits the right of subrogation of the insurer to recover over against the carrier, upon paying to the shipper the loss.

Where the carrier is actually and in terms the party assured, the under-

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writer can have no right to recover over against the carrier, even if the amount of the policy has been paid by the insurance company to the owner, on the order of the carrier.

The claim of the master of the vessel, through whose loss the loss of the goods insured took place, to exemption from liability to the insurance companies having been adjudicated against him, and the appeal to this court on that judgment having been dismissed for want of jurisdiction, he is estopped from again setting up that claim in this case.

IN ADMIRALTY. The case is stated in the opinion.

Mr. J. A. Hyland for Wager.

Mr. Edward D. McCarthy, for the Providence Insurance Company and another.

Mr. Spencer Clinton, (with whom was *Mr. George Clinton* on the brief,) for Morse.

MR. JUSTICE SHIRAS delivered the opinion of the court.

In May, 1883, Armour, Plankinton & Co., grain merchants, having their place of business at New York city, were the owners of a cargo of wheat, which they desired to have brought from Buffalo to New York. Henry Morse and Alanson Morse, composing the firm of H. Morse & Co., were doing business as intermediaries or middlemen between boatmen and shippers in procuring cargoes to be shipped. Charles E. Wager was the master and owner of the canal boat William Worden, and also of the steam canal boat Sydney.

Through one Meadows, as their agent, Armour, Plankinton & Co. made a contract with H. Morse & Co., whereby the latter employed Charles E. Wager to take the cargo of wheat, amounting to 7900 bushels, on the boat William Worden, for transportation from Buffalo to New York.

In the spring of 1883, before this cargo was shipped on the canal boat William Worden, the said insurance companies delivered to H. Morse & Co. an open or running cargo policy, which contained the following terms and covenants:

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"*Uniform Canal Cargo Policy.*

"The New England Underwriters.

"The Security Insurance Co., of New Haven, Conn.

"The Providence Washington Insurance Co., of Providence, R. I.

"Each acting and contracting for itself, and not one for the other, for the true performance of the premises; each company for its own part only, which is one-half of all liability accruing under this policy, by this policy of insurance, on account of H. Morse & Co., for whom it may concern, do insure the several persons whose names are hereafter endorsed hereon as owner, advancer, or common carrier, on goods, wares, merchandise, or country produce, on his own boat, or boats belonging to others, loaded on commission or chartered, from place to place, as endorsed hereon, or in a book kept for that purpose, for the several amounts, at the rate, and on the goods, wares, merchandise, or country produce, as specified in the said endorsement.

"No risk considered as insured under this policy until said endorsement is approved and signed by these companies, or their duly authorized agents at ———, unless with special agreement with the companies and endorsed hereon."

Before the cargo in question was put on board the William Worden, H. Morse & Co. applied to Worthington & Sill, the general agents at Buffalo of these insurance companies, to insure the cargo of wheat while *in transitu* on board the William Worden.

That application was in writing, as follows:

"Worthington & Sill, General Agents.

"New England Underwriters' Canal Insurance.

"Office, No. 48 Main Street, Buffalo, N. Y.

"Insurance is wanted by H. Morse & Co. Loss, if any, is payable to do. or order, on wheat inboard cargo of boat 'William Worden.' $9875, from Buffalo to New York.

"Rate —— cts. is.....$———

"Total premium.....$———

"Buffalo, May 17, 1883. H. Morse & Co., *Applicant.*"

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On receipt of this application, Worthington & Sill delivered to H. Morse & Co. a certificate of insurance in the following words:

"Providence Washington Insurance Co., Providence, R. I.
"Security Insurance Co., New Haven, Conn.
"New England Underwriters.
"Inland Marine Department.
"Worthington & Sill, Gen'l Agents, Buffalo, N. Y.

"*Canal Cargo Certificate.*

"No. 668. $9875.

"This certifies that H. Morse & Co. insured under and subject to the conditions of policy, No. 772, issued by the New England Underwriters, in the sum of ninety-eight hundred seventy-five dollars, inboard cargo of boat 'William Worden.' On wheat $9875, at and from Buffalo to New York.

"Loss (if any) payable to assured or order and return of this certificate. This certificate of insurance is not valid until countersigned by the authorized agents for this company at Buffalo, N. Y.

"Buffalo, N. Y., May 17, 1883.

"WORTHINGTON & SILL,
"*General Agents.*"

Upon the delivery of said certificate of insurance, Worthington & Sill entered in the book kept for that purpose, "H. Morse & Co., boat 'William Worden,' from Buffalo to New York, $9875, rate 15 cts., premium $14.82, wheat." This certificate of insurance was endorsed in blank by H. Morse & Co., and delivered to Meadows, the agent of Armour, Plankinton & Co.

Thereupon Wager and H. Morse & Co. signed and delivered to Meadows an affreightment contract or bill of lading as follows:

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Opinion of the Court.

"[Vignette.]

"BUFFALO, *May* 17, 1883.

"Shipped by W. Meadows, in apparent good order, on board the canal boat 'Wm. Worden,' of Morse, whereof ——— ——— is master, the following-described property, to be transported to place of destination without unnecessary delay, and to be delivered as addressed on the margin in like good order, in the customary manner, free of lighterage, upon payment of freight and charges as prescribed in this bill. Consignees to pay all harbor towing from and to the usual place of landing. Three week days, regardless of weather, (including day of arrival, providing notice of arrival shall be given before four o'clock P.M.,) after arrival and notice of same, to be allowed consignees to discharge this cargo, after which time the cargo or consignees are to pay demurrage at the rate of two and one-half per cent per day upon the freight, including tolls, for each and every day of such demurrage over the three days as above specified, until the cargo is fully discharged. And it is agreed between the carriers and shippers and assigns that in consideration, especially of the rate of freight hereon named, the said carriers having supervised the weighing of said cargo inboard, hereby agree that this bill of lading shall be conclusive as between shippers and assigns and carriers as to quantity of cargo received inboard and to be delivered at port of destination, and that they will deliver the full quantity hereon named. All damage caused by the boat or carrier, or deficiency in the cargo from quantity as hereon specified, to be paid for by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee. In case grain becomes heated while in transit, the carrier shall deliver his entire cargo and pay only for any deficiency caused by heating exceeding five bushels for each one thousand bushels.

"The freight charges and demurrage payable to as directed below or order, at place of destination, who is the only party authorized to collect the same, and whose receipt shall be in full for all demands on this cargo or bill of lading.

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"In witness whereof the said master of said boat hath affirmed to two bills of lading, one marked 'Original' and one marked 'Duplicate,' of this tenor and date, one of which being accomplished, the other to stand void.

"7900 bu. No. 2 red wheat, ex cargo schr. 'R. Hallaran.'

"Freight to New York, five (5) cents per bu.

"Advanced charges, $200.

"H. Morse & Co.,

"Per C. E. Wolfe.

"(Seventy-nine hundred bushel.)

"C. E. Wager.

"(In margin:) Armour, Plankinton & Co., New York.

"The freight charges and demurrage, to the amount of $516.94, are payable by check to the order of the National Bank of the Republic, in New York, such check to be delivered to E. B. Brooke & Co., for such bank; the balance is payable to said E. B. Brooke & Co., who is the only party authorized to collect the same, whose receipts shall be in full for all demands therefor."

Meadows, before the William Worden started from Buffalo, forwarded this bill of lading, with the said certificate of insurance attached thereto, to Armour, Plankinton & Co., at New York.

Wager signed and delivered to H. Morse & Co. a collateral or sub-affreightment contract or bill of lading, in the following words and figures:

"Buffalo, *May* 18, 1883.

"Shipped by H. Morse & Co., in apparent good order, on board the canal boat 'William Worden,' of Syracuse, whereof Charles E. Wager is master, the following-described property to be transported to place of destination, without unnecessary delay, and to be delivered as addressed on the margin, in like good order, in the customary manner, free of lighterage,

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upon payment of freight and charges, as prescribed in this bill.

"Consignees to pay all harbor towing from and to the usual place of landing. Three week days, regardless of weather, (including day of arrival, providing notice of arrival shall be given before four o'clock P.M.,) after arrival and notice of same, to be allowed consignees to discharge this cargo, after which time the cargo or consignees are to pay demurrage at the rate of two and one-half per cent per day upon the freight, including tolls, for each and every day of such demurrage over the three days as above specified, until the cargo is fully discharged. And it is agreed between the carriers and shippers and assigns that in consideration especially of the rate of freight hereon named, the said carriers having supervised the weighing of said cargo inboard, hereby agree that this bill of lading shall be conclusive as between shippers and assigns and carriers as to quantity of cargo received inboard and to be delivered at port of destination, and that they will deliver the full quantity hereon named. All damage caused by the boat or carrier or deficiency in the cargo from quantity as hereon specified to be paid for by the carrier, and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee. In case grain becomes heated while in transit, the carrier shall deliver his entire cargo and pay only for any deficiency caused by heating, exceeding five bushels for each one thousand bushels.

"The freight charges and demurrage to the amount of $—— are payable by check to the order of ——— ———, New York, such check to be delivered to ——— ——— for such bank, the balance payable to said ——— ———, who is the only party authorized to collect the same, whose receipt shall be in full for all demands therefor.

"Tolls on this cargo having been advanced by H. Morse & Co., if refunded, must be to them or to their order.

"In witness whereof the said master of said boat hath affirmed to two bills of lading, one marked 'Original' and one marked 'Duplicate' of this tenor and date, one of which being accomplished, the other to stand void.

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"7900 bushels of wheat.
"Freight to New York, per bushel, 5..... $395 00
Captain's advance..... 319 44

On safe delivery, E. B. Brooke & Co. collect as above and pay captain..... $75 56
"Hold, subject to our draft, $319.44. H. Morse & Co.,
"Care E. B. Brooke & Co., New York. *Fero.*
"J. W. Schlehr, Dept. Clerk."

Morse & Co. advanced to Meadows, the agent of Armour, Plankinton & Co., $200 for prior advances made by said agent upon the wheat, being charges for carriage from Chicago to Buffalo, and by the bills of lading the cargo was to be delivered upon payment of this advance and the freight. Pursuant to the contract between Meadows, agent, and Morse & Co., the latter agreed and undertook, for and in consideration of the payment of $395, the payment of which was made a lien on the cargo, to transport the same to New York, and to insure the cargo. Morse & Co. paid the premium to the insurance companies.

Upon the voyage the William Worden was wholly under the control of the steamboat Sidney, and both boats were navigated practically as one vessel. On May 28, 1883, while proceeding on the voyage down the Hudson River, the William Worden struck the rocks on Esopus Island and sunk, and her cargo was damaged to the amount of $6175.89.

On June 26, 1883, the insurance companies paid to Armour, Plankinton & Co. the sum of $9211.75 on account of the loss of the cargo insured and upon an abandonment by the owners to the insurance companies, and about the same time they paid Morse & Co. the sum of $520 in full for their interest in the cargo, in which sum was included $14.82, the premium theretofore paid by them on the policy.

Subsequently the insurance companies brought an action *in rem* against the boats William Worden and Sidney in the Circuit Court for the Southern District of New York, and in that action Wager intervened as owner of the vessels, and

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Morse & Co. became sureties for the Worden and for claimant's costs.

In this suit it was found that the carriers had been guilty of negligence in their management of the said vessels in the voyage, which had resulted in the loss, and the Circuit Court decreed that the two vessels be condemned in favor of the insurance companies.

In May, 1887, the insurance companies filed in the District Court of the United States for the Northern District of New York a libel and complaint against Henry Morse & Co. and Charles E. Wager, whereby the libellants sought to be subrogated to the claims of the owners against the respondents as carriers. This cause was so proceeded in that a decree in favor of the libellants was rendered by the District Court against the respondents for $6292.16, whereof $4617.16 was payable by all the respondents, jointly and severally, and $1675 was payable by Wager severally.

From this decree separate appeals were taken, one by H. Morse & Co. and one by Charles E. Wager, to the Circuit Court of the United States for the Northern District of New York. The Circuit Court reversed the decree of the District Court against H. Morse & Co., and dismissed the libel as to them, and affirmed the decree against Wager, and gave judgment against him, including interest and costs in both courts, for $8446.37. From this decree of the Circuit Court separate appeals have been taken to this court, one by the insurance companies, complaining of the dismissal of the libel against H. Morse & Co., and the other by Charles E. Wager, complaining of the decree against him.

We shall first consider the questions arising under the appeal of the insurance companies.

It is contended that the insurance companies, having paid the loss to the owners of the cargo, are entitled to be subrogated to the rights of the assured against the carriers.

It is too well settled by the authorities to admit of question that, as between a common carrier of goods and an underwriter upon them, the liabilty to the owner for their loss in destruction is primarily upon the carrier, while the liability of

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the insurer is only secondary. The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods, and the will incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract or for non-performance of his legal duty. Standing thus, as the insurer does, practically, in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the right of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner. Hence it has often been ruled that an insurer, who has paid a loss, may use the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss. *Hall & Long* v. *Railroad Companies*, 13 Wall. 367, 369.

But it is equally well settled that the right, by way of subrogation, of an insurer, upon paying for a total loss of the goods insured, to recover over against the carrier, is only that right which the assured has, and that accordingly when a bill of lading provides that the carrier, when liable for the loss, shall have the full benefit of any insurance that may have been effected upon the goods, this provision is valid, as between the carrier and the shipper; and that, therefore, such provision limits the right of subrogation of the insurer, upon paying the shipper the loss, to recover over against the carrier. *Phœnix Ins. Co.* v. *Erie & Western Transportation Co.*, 117 U. S. 312; *St. Louis, Iron Mountain &c. Railway* v. *Commercial Union Insurance Co.*, 139 U. S. 223.

If a valid claim by the underwriter to be subrogated to the rights of the owner will not arise where the carrier has contracted with the owner that he, the carrier, shall have the benefit of any insurance, it would seem to be clear that where the carrier is actually and in terms the party insured, the

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underwriter can have no right to recover over against the carrier, even if the amount of the policy has been paid by the insurance company to the owner on the order of the carrier.

The facts in the present case were that the open policy declared that it was issued on account of H. Morse & Co. for whom it may concern, and that it insured the several persons, whose names should be thereafter endorsed thereon as owner, advancee, or common carrier on goods, wares, merchandise, or country produce, on his own boat, or boats belonging to others, loaded on commission or chartered.

Under this open policy, Morse & Co. applied to the insurance companies, stating that insurance was wanted by H. Morse & Co., on wheat valued at $9875, from Buffalo to New York. Loss, if any, to be payable to Morse & Co. or order. Upon this application, the insurance companies issued what is termed an insurance certificate to H. Morse & Co., setting forth that, subject to the conditions of policy No. 772, H. Morse & Co. insured, in the sum of $9875, the inboard cargo of boat William Worden; the loss, if any, to be payable to assured or order, and return of this certificate. The premium was paid by H. Morse & Co.

Clearly, under this state of facts, H. Morse & Co. were, nominally at least, the parties insured, and came within the terms of the policy, and, upon a loss, were entitled to receive the amount of the policy, and, of course in that event, the insurers could not, after having paid H. Morse & Co. the amount of the loss, recover it back from them under the principle of equitable subrogation. The question then arises whether a different conclusion should be reached because of the fact that H. Morse & Co., when they delivered the bill of lading to Meadows as agent for Armour, Plankinton & Co., attached thereto the insurance certificate endorsed by them in blank.

So far as the insurance companies were concerned, H. Morse & Co. were under no obligation to transfer the policy to Armour, Plankinton & Co., nor to make it payable to them in case of loss. That was a matter entirely between H. Morse & Co., as carriers, and Armour, Plankinton & Co., as consignees and owners of the cargo.

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When, subsequently, the insurance companies paid to Armour, Plankinton & Co. the amount of the loss, they did so, not by virtue of any contract between themselves and the consignees, but of the contract between themselves and H. Morse & Co., whereby they had agreed to pay the loss to the latter or order.

We think, therefore, that the Circuit Court was right in dismissing the libel against H. Morse & Co., and its decree to that effect should be affirmed.

Coming now to the appeal of Wager, No. 41, October term, 1893, we are met by the contention that Wager, as master of the Sydney and as carrier, was entitled to the benefit of the insurance, and that, hence, it was error on the part of the Circuit Court to allow the insurance companies to recover against him by way of subrogation. It is admitted that Wager was not nominally, and in terms, insured; but the testimony of Morse and of Wager himself is relied on as showing that it was understood and intended that Wager was a beneficiary under the policy.

We are not called upon to consider whether this parol evidence was admissible to affect the meaning and legal effect of the policy and certificate of insurance, nor what the proper conclusion would be, if the evidence were competent, because the question of Wager's liability was determined and adjudicated against him in the case of *The Sydney*, in the Circuit Court for the Southern District of New York, as stated in the findings of facts in this case, and reported in 27 Fed. Rep. 119.

In that case, the libellants, the insurance companies, alleging that they had paid the owners of the cargo the loss occasioned by the negligence of the carrier in charge of the vessel, sought to be subrogated to the owner's cause of action, and Wager, having been permitted to intervene as claimant, by his answer admitted that he was owner of the vessel, denied that the libellants had insured the owners of the cargo, and claimed that he had paid the premium to the insurance companies, upon the agreement that the benefit of the policy, in case of loss, should accrue to his benefit as carrier, and that,

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therefore, no right of subrogation in favor of the insurance companies existed.

These issues of fact and law were determined against Wager and in favor of the insurance companies, and a final decree condemning the vessel was rendered. This decree remains unreversed and in full force.

It cannot be questioned that, in the present case, the Circuit Court could, and this court on appeal can, take notice of the former case in the Southern District, because the proceedings and decree therein are set up at length in the answer of Wager in the present case. It is true that Wager alleges, in his answer, that he had prosecuted an appeal to the Supreme Court, which was then pending. But the record of that appeal shows that it was dismissed by this court for want of jurisdiction. *The Sydney*, 139 U. S. 331.

We think, therefore, that the Circuit Court did not err in regarding Wager as having been concluded by the trial and decree in the former case, and in entering a final decree against him.

In both appeals the decree of the Circuit Court is

Affirmed.

MR. JUSTICE BROWN, not having heard argument in this case, took no part in its decision.

BALL AND SOCKET FASTENER COMPANY *v.* KRAETZER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 58. Argued October 27, 1893. — Decided November 6, 1893.

The fourth and seventh claims in letters patent No. 325,688, issued to Albert G. Mead, September 8, 1885, for a "button" are not infringed by glove fasteners manufactured under letters patent Nos. 359,614 and 359,615, issued to Edwin J. Kraetzer, March 22, 1887; and though it would be possible to make out a literal infringement of the sixth claim, by con-

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Statement of the Case.

struing the claim broadly, the court holds that the patentee is not entitled to such construction.

There is no equity in charging infringement upon a defendant in a patent suit, in consequence of an apparently accidental adoption of an immaterial feature of the plaintiff's patent.

When costs are unnecessarily increased by the incorporation of useless papers, costs may be imposed upon the offending party under Rule 10, Paragraph 9; and they are imposed in this case.

THIS was a bill in equity originally filed for the infringement of six letters patent for improvements in glove fasteners, five of which patents were issued to William S. Richardson and one to Albert G. Mead.

A plea having been filed upon the ground of multifariousness, two of the patents were stricken from the bill upon the application of the plaintiff.

The only patent relied upon at the hearing or covered by the assignments of error was that to Albert G. Mead, No. 325,688, issued September 8, 1885, for a "button." In his specification patentee states: "This invention relates to metallic fastenings employed in securing the separate flaps of any article, such as gloves or other similar articles of wear, in lieu of the ordinary button and button-hole, and pertains especially to that class entitled 'ball-and-socket fastenings' in which a ball is adapted to be enclosed by and retained within the hollow or socket member, when the fastening is actively employed. I consider my present invention embraces, first, the method of centrally securing the socket portion of the fastening to the article, whereby the open part or socket of said member is disposed upon the under side of the flap, and secured by a rivet extending through the fabric, thus in permanently securing it to the latter a suitable button-head or cap is employed upon the upper surface of the flap, and can be so formed and constructed as to form a button finish, a result much desired, since it gives the article an appearance exactly similar to an ordinary button, which is the most neat and tasty finish that can be employed in the class of articles of apparel to which such fastenings are usually attached, but, further, the whole device is thereby concealed and prevented from becoming caught and broken; secondly, in the peculiar method of form-

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ing the ball member of said fastening, as likewise that of the rivet by which the ball is secured to the fabric, the two parts forming a unit and readily used in connection with the socket member, forming an article very easily manufactured, cheap, and inexpensive, and one which presents an unusually ornamental finish."

Defendant was manufacturing under letters patent Nos. 359,614 and 359,615, granted to him March 22, 1887, for improvements in glove fasteners.

The case was heard upon pleadings and proofs, and the bill dismissed upon the ground that the defendant had not infringed. 39 Fed. Rep. 700.

No appeal was taken from the decree of the Circuit Court dismissing the bill as to the three Richardson patents remaining, and the appeal only involved the consideration of the fourth, sixth, and seventh claims of the Mead patent. These claims were as follows:

"4. In a fastening device of the nature described, the enclosing portion composed of a hollow socket centrally secured to the fabric by a button-head, F, and with the enclosing portion disposed upon the under side of the flap, substantially as stated.

"6. A member of a fastening device consisting of a hollow socket, in combination with a rivet and button-head, whereby it is centrally attached to the fabric, substantially as set forth.

"7. A member of a fastening device composed of a hollow socket, D, centrally attached by an eyelet, *l*, the latter resting upon and within an annular depression, *q*, formed in a concaved collet or disk, E, substantially for the purpose herein set forth."

Mr. Thomas William Clarke for appellant.

Mr. John R. Bennett, (with whom was *Mr. W. B. H. Dowse* on the brief,) for appellee.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

The invention of Mead consists of a glove fastener having on the button side a knob with a shank to it, which passes

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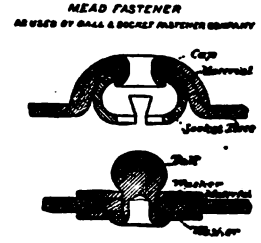
through two washers, one of which washers is above and the other below the glove fabric, and the shank is upset on the lower side of the lower washer. The swell of the knob is sufficient to allow of an engagement with the clasp or spring sides of the button-hole member of the fastener. This button-hole member, which is the one alleged to be infringed, consists of an imperforated cap or button-head, F, and an elastic socket, D. The button-head F consists of three parts, a solid cap, F, an interior disk, E, perforated at the centre, and the attaching eyelet *l* descending from it. A modification of this portion of the device is shown in Fig. 12, wherein the imperforated cap or button-head, F, is omitted, the button-head consisting simply of a dished washer, E. In this form, which is as efficient and much cheaper, the eyelet is made flush with the exterior surface of the disk, E. In order to present a more perfect

Fig. 4.



finish, and at the same time to prevent the edges thereof from catching, the patentee forms an annular depression in the top of disk E, to a depth equal to the thickness of the metal forming the eyelet. Thus a smooth exterior surface is secured.

In both forms of his device, illustrations of which are here given, the dished washer is necessarily present, because it is the thing which, by being riveted to the spring-mouth socket, serves to fasten the structure to the glove-flap, the leather of which is squeezed by the exterior of the socket against the interior of the button-head or dished washer E.

The socket, D, consists of a cup-shaped washer with spheroidally-curved wings. The cup-shaped washer, with its wings curved slightly inward at their lower edges, and thus presenting a contracted but outwardly-yielding mouth, consti-

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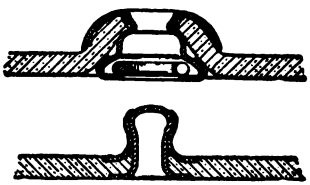
tutes the spring-socket for receiving and holding the knob. The upper part of this socket is perforated at its centre to receive the rivet or eyelet projecting downward from the upper portion of the cap. In the application of this fastener to a glove fabric, a hole is pierced in the fabric large enough for the passage of the eyelet, and the two hemispheroidal metallic surfaces, one of which surfaces is the outside of the upper part of the socket, and the other of which is the inside of the cap or exterior piece, are for some considerable distance parallel to each other, and thus the fabric of the glove is stretched into a dome shape, by being compressed or nipped between the back of the socket and the inside of the cap, and is firmly held by this engagement.

It is admitted that Mead did not invent this spring socket, nor the perforation at its centre; and while he did not invent the attachment of that socket to the fabric by a flat washer, the surface of which lay in a line parallel to the tangent line of the upper surface of the dome of the socket, it is claimed that he did invent the application of a curved or cup-shaped cap in the place where the flat washer had previously been.

In the Kraetzer patent, the button-hole member, of which an illustration is given below, consists of a perforated top shell



Kraetzer Fastener.

or cap, A, with a central opening, B, which is surrounded by an annular depression or countersunk cavity. The opening, B, is adapted to receive the upper end of a spring shell, which has an annular shoulder, E, at its base, and a contracted neck at its top. The spring which engages the button member of the Kraetzer fastener is a coiled-wire ring, split on one side, so as to expand as the button passes through it. This spring ring is loosely held in its chamber. The spring chamber is

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composed of two pieces of metal united around their edges, one of which has a tubular extension which passes through the fabric and is engaged with a cap or button-head on the other side of the fabric.

In the Mead socket the resiliency of the button-hole member is in the socket itself, which is directly attached to the fabric. In the Kraetzer fastener the part which engages the button-head or stud serves no other purpose whatever, but rests loosely in the chamber of its holder. This holder or shell is clamped permanently and firmly to the fabric, and is never expanded or contracted as in the Mead socket. In engaging and disengaging the fastener, the wire ring alone expands and contracts.

From this statement of the construction of the two devices, which can be made more apparent by a comparison of the drawings, it is very evident that they are constructed upon different principles and operated in a wholly different manner.

But it is claimed that an elastic mouth, combined with and firmly united to a dome, the mouth and dome being situated wholly on the under side of the flap and secured by a button-head wholly upon the upper side of the flap, was not known in the art prior to the Mead patent, and that the effect of this is, taken in connection with the fact that the hole in the flap need not be any larger than the diameter of the rivet, as stated by the plaintiff's expert, "that the spring socket presses the glove leather upward into the button-head, and squeezes the leather against the inner surface of the button-head." If this feature be an advantage, as now claimed, it is strange that no allusion is made to it in the specifications; and in his testimony the patentee stated directly that in describing his invention as set forth in his patent, in the attachment of the fastener to the fabric, he did not contemplate any stretching of the leather, or that the hole in the fabric should be of any particular size, or any other effect than is produced when two parts are fastened together by an eyelet. On the contrary, it would appear that this squeezing of the leather could only take place where the disked washer or cap was used, and in his specifications the patentee states that "the disk, E, may

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be a flat plate, but, in the present instance, I have shown its outer edge or circumference bent in order to approximate to the general shape of the button-head when the latter is pressed into its finished form," and thus it strengthens said cap. This would indicate that the advantage now claimed of a tighter compression of the leather was not originally within the contemplation of the patentee, but is an afterthought, suggested by his inability to make out a case against the defendant of an infringement of the spring portion of the socket.

Applying these considerations to the different claims of the patent, it is quite evident that there is no infringement of the fourth claim, which includes as an element the imperforated button-head, F, which is not found in the Kraetzer patent.

It is equally clear that there is no infringement of the seventh claim, since the Kraetzer device has not "the hollow socket, D," but a socket of a wholly different construction, operating in a different manner, and depending for its elasticity, not upon the peculiar inwardly projecting wings of the Mead socket, but upon a ring concealed within its walls. Neither has it the eyelet *l*, unless the tapering upper end of the spring shell of the Kraetzer patent can be regarded as an equivalent.

The charge of infringement must rest, then, upon the sixth claim, which is for "a member of a fastening device consisting of a hollow socket in combination with a rivet and button-head, whereby it is centrally attached to the fabric, substantially as set forth." While, by construing the "hollow socket" broadly as including every kind of a hollow socket appropriate for that purpose, and by construing the upper part of such socket as equivalent to the rivet, *l*, of the Mead patent, it would be possible to make out a literal infringement, yet we do not think the patentee is entitled to such a broad construction of his claim, in view of the fact that the only function obtained by the defendant in the use of his combination is that of squeezing the leather upward into the button-head — a function of very doubtful advantage, and apparently of no value to the Kraetzer device, and one never contemplated by Mead or alluded to in his specification. We think it too frail

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a support to hang a charge of infringement upon. When the essential operation of the two devices is so different there is no equity in charging infringement upon the defendant by an apparently accidental adoption of an immaterial feature of the plaintiff's patent.

We are, therefore, of opinion that the court below committed no error in its disposition of the case; but, in view of the fact that the appellee has seen fit to encumber the record with copies of some fifty immaterial patents, we think it a proper case for the application of the 10th rule, which authorizes us (paragraph 9) to impose costs upon an appellee guilty of requiring unnecessary parts of the record to be printed, and that he should be charged with half the cost of printing the record in this case. "Care should be taken that costs are not unnecessarily increased by incorporating useless papers, and that the case is presented fairly and intelligently." *Railway Co.* v. *Stewart*, 95 U. S. 279, 284. With this qualification the decree is *Affirmed.*

GRAVES *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

No. 838. Submitted October 19, 1893. — Decided November 6, 1893.

Where objection is made in a criminal trial to comments upon facts not in evidence or statements having no connection with the case or exaggerated expressions of the prosecuting officer, it is the duty of the court to interfere and put a stop to them if they are likely to be prejudicial to the accused.

The wife of a person accused of crime is not a competent witness, on his trial, either in his own behalf or on the part of the government, and a comment to the jury upon her absence by the district attorney, permitted by the court after objection, is *held* to be reversible error.

THIS was a writ of error upon the conviction of the plaintiff in error for the murder of an unknown man in the Indian Territory on the 13th day of February, 1889.

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Statement of the Case.

The evidence on the part of the prosecution tended to show that several days before the murder two men stopped together at Vian, and obtained a contract to make rails for one Waters, and lived in a house about one mile from Waters' residence. They came from Winslow, in the State of Arkansas, in an old vehicle drawn by two horses, and were on their way to Oklahoma, staying at Vian for a few days for the purpose of earning provisions for themselves and horses. One of these men was accompanied by his wife and two small children. After remaining for several days they left the neighborhood, and were next seen camping near the scene of the murder, on the evening of February 13. Their personalities were remembered although their names were forgotten, except that a boy remembered the name of one of them to have been John Graves. The morning after they were seen together in camp one of the men was seen putting the horses to the vehicle, in which were the woman and a child, but the witness saw but one man and one child. About the 1st of May following, the remains of a dead man were found near the place where the witness claimed to have seen the people camped. The body was decayed, but was identified mainly by peculiarities of the teeth and clothing. He was the man who had claimed to own the horses and wagon. The witnesses for the prosecution recognized the defendant Graves as the other man, though to most of them his name had been unknown. Defendant's wife was admitted to have been in town at the time of the trial, but did not appear in the court-room. She was seen by one of the witnesses of the prosecution outside of the court-room, and was believed by the witness to have been the woman who had been with the party.

The defence was an alibi, and was supported by several witnesses, who swore that in the months of January, February, and March of that year defendant was in Washington County, Arkansas, a distance of one hundred miles or more from the place where the remains of the dead man were found. Upon conviction of murder, defendant sued out this writ of error, making fifteen assignments of error.

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Mr. A. H. Garland for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendants in error.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

The first assignment of error is to the action of the court in permitting "the district attorney in his closing argument to the jury, over the objections of the defendant, to comment upon the absence of the defendant's wife from the presence of the court, and to state, among other things to the jury, that the defendant's wife ought to have been sitting by the side of her husband during the trial, so that witnesses for the government could see her and identify her as the woman who was said to have been with the defendant in the Indian country before the unknown man's remains or bones were found, and other like arguments, statements, and declarations." While we do not wish to be understood as holding that comments by the district attorney upon the facts not in evidence, or statements made having no connection with the case, or exaggerated expressions, such as counsel in the heat of trial are prone to indulge in, will necessarily vitiate a verdict, if not objected to, yet when the attention of the court is called to them specially, and objection is made, it is its duty to interfere and put a stop to them if they are likely to be prejudicial to the accused. *Wilson* v. *United States*, 149 U. S. 60; *Hall* v. *United States*, *ante*, 76.

Had the wife been a competent witness, the comments upon her absence would have been less objectionable. It was said by Chief Justice Shaw in the case of the *Commonwealth* v. *Webster*, 5 Cush. 295, 316: "But when pretty stringent proof of circumstances is produced tending to support the charge, and it is apparent that the accused is so situated that he can offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circum-

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stances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to support the charge." The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable. 1 Starkie on Evidence, 54; *People* v. *Hovey*, 92 N. Y. 554, 559; *Mercer* v. *State*, 17 Tex. App. 452, 467; *Gordon* v. *People*, 33 N. Y. 501, 508.

But this presumption does not apply to every fact in the case which it may be in the power of the defendant to prove. He is not bound to anticipate every fact which the government may wish to shew in the course of the trial, and produce evidence of that fact. In this case the wife was not a competent witness either in behalf of, or against her husband; if he had brought her into court, neither he nor the government could have put her upon the stand, and he was under no obligation to produce her for the purpose assigned by the district attorney, that the witnesses for the government could see her and identify her as the woman who was said to have been with the defendant in the Indian country before the unknown man's remains or bones were found. Permission to make this comment was equivalent to saying to the jury that it was a circumstance against the accused that he had failed to produce his wife for identification, when, knowing that she could not be a witness, he was under no obligation to do so. The jury would be likely to draw the inference that she was prevented from testifying for her husband because her evidence might be damaging. It was in fact as if the court had charged the jury that it was a circumstance against him that he had failed to produce his wife in court.

The view we have taken of this assignment of error renders it unnecessary to consider the others.

The judgment must be

Reversed, and the case remanded with instructions to set aside the verdict and grant a new trial.

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MR. JUSTICE BREWER dissenting.

I dissent from the opinion and judgment of the court in this case. I think that the absence of the defendant's wife from the court-room was, under the circumstances, a legitimate subject of comment in argument. The theory of the prosecution was, that one of the two men who came to Vian was murdered by the other; that the body found was that of the murdered man; that the defendant was the murderer. The testimony was abundant that these men were accompanied in their trip by the wife and two small children of one of them. Defendant attempted to prove an alibi, and to show that at the times named, and when these two men were in the Territory, he was in Washington County, Arkansas, — more than a hundred miles away, — and that his wife was with him there. Witnesses for the prosecution who saw the two men and the woman at Vian, and who identified this defendant as one of those men, would unquestionably be strengthened in their testimony, if upon seeing the woman they were also able to identify her. There might be some mark, some peculiarity of feature in the wife — something, perhaps, for the time being forgotten — which would make the witnesses absolutely sure that she was the woman who was present in the Territory. And, conversely, there might be some peculiarity in the features of that woman which, not found in the defendant's wife, would have led the witnesses to hesitate as to their identification of him. One way or the other, a sight of her by the witnesses for the prosecution might be a significant factor in determining his identity. There was evidence before the jury that she was in Fort Smith during the trial, and yet she was not in the court-room by the side of her husband, or where she could be seen by all the witnesses. It is true several reasons for her absence might be suggested: She might have been in such a condition of health as to render it unsafe for her to come to the court-room; she might have been alienated from him, and indifferent as to his conviction or acquittal. But, nevertheless, it was a suggestive fact, and an obvious fact, and, therefore, a legitimate subject of comment

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by counsel. I do not understand that a jury in their deliberations are limited to a consideration of that which is, strictly speaking, testimony, but may properly consider any facts developed in the trial from which a reasonable inference may be drawn for or against either party. If, for instance, the fruits or instruments of crime are introduced in evidence, is not the action and conduct of the defendant at the sight of them, as also his demeanor generally in the presence of the jury, a matter of consideration and legitimate comment? If it be developed that a witness exists, presumably under the control of the defendant, who can throw light upon a vital matter, and he is not produced, may not the jury fairly consider that fact, and may not counsel comment on it? In the case of *Commonwealth* v. *Clark*, 14 Gray, 367, there was testimony tending to show that the son of defendant was present and participated in some of the acts relied upon as evidence of guilt. The son was not called as a witness by the defendant, and in the argument of the district attorney this fact was commented upon as tending to show his guilt. An instruction was asked to the effect that the jury must find the defendant guilty, if at all, upon the evidence given under oath in the case, and not from the absence of any witness who might have been produced, but was not. This instruction the court refused to give, but told the jury in substance that it was proper to consider the omission to produce this witness. In respect to this matter the Supreme Court observed as follows: "The omission of the defendant to produce his son as a witness to meet and explain the evidence offered by the government in support of the indictment was a proper subject of comment by counsel, before the jury, and might well be considered by them in connection with the testimony in the case. The witness was in the employment of the defendant and in his interest, and could probably have given an explanation of some of the facts tending to show the guilt of the defendant, if they were susceptible of any construction favorable to his innocence. The failure to call the witness was not relied on as substantial proof of the charge by the government; other evidence had been offered to establish that, which was submitted to the jury

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with proper instructions. If this evidence, unexplained, tended to prove his guilt, and he failed to bring evidence within his control to explain it, his omission to do so was a circumstance entitled to some weight in the minds of the jury."

In that case, as in this, there might have been some satisfactory reason for the absence of the witness; but none was given, and it was held, and rightly, that his non-production was a subject for consideration and also for comment. See also *Gavigan* v. *Scott*, 51 Michigan, 373; *Tobin* v. *Shaw*, 45 Maine, 331; *Commonwealth* v. *Webster*, 5 Cush. 295, 316; *McDonough* v. *O'Neil*, 113 Mass. 92; *Blatch* v. *Archer*, Cowper, 63, 65; 1 Starkie on Evidence, 54. Somewhat analogous are the following cases: *State* v. *Griffin*, 87 Missouri, 608, in which the prosecuting attorney commented upon the fact that the defendant's mother, though living only fifteen miles from the court-room, was not present at the trial, and had evidently abandoned him; and such comments were held by the Supreme Court not sufficient to disturb the judgment. It is true, however, the attention of the trial court was not called to the matter. *North Carolina* v. *Jones*, 77 N. C. 520, in which the defendant, having had a witness sworn, declined to examine him, and that fact was commented on by the prosecuting officer in his closing argument. Objection was made by the defendant, but the court declined to interpose; and in this it was held by the Supreme Court that there was no error. *Inman* v. *Georgia*, 72 Georgia, 269, 278. In this case it appeared that a continuance had once been obtained on the ground of the absence of a witness, and that when the trial was had the witness was present in court, but was not sworn or examined. Objection was made, but the court permitted the counsel to proceed, and in respect to this the Supreme Court observed: "The court held that the conduct of the accused and his counsel during the continuance of the trial were the proper subjects of comment by the counsel engaged in the case. Counsel are allowed the largest liberty in the argument of cases before juries; and whether the argument be logical or illogical, or whether the inferences and deductions drawn by them are correct or not, this court will have no power to intervene.

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Facts not proved cannot be discussed, but illogical conclusions from facts proved may be insisted upon, and there is no remedy; but in this case, we think, it was legitimate for counsel to allude to what had transpired in the case, from the time it was called through its whole proceeding, and the conduct of the party or his counsel in connection therewith was the proper subject of comment, and there was no error on the part of the court in allowing the comments of the solicitor general in this case." *People* v. *White*, 53 Michigan, 537, 539. This was a case of bastardy, in which counsel commented upon the resemblance between the defendant and the child of the complaining witness, then present in the court-room, and in respect to this the Supreme Court said: "We do not well see how the jury could be prevented from noticing the child, which was properly enough in court; and while arguments of resemblance in so young an infant, in the absence of peculiarities, are a little preposterous, it is difficult on this record to determine that any rule of law was violated in discussing it."

In this case the wife could not be a witness for her husband, it is true; and yet her presence in the court-room, a presence ordinarily to be expected, would most certainly and obviously have aided materially in the identification of the defendant. She was in the city, as the testimony showed, and her absence from the court-room, unexplained, certainly suggested a motive, and that motive one which cast suspicion upon the defendant. I think the rule that should be laid down is, that, in the absence of express prohibition, every fact which, in no illegal manner, comes to the knowledge of the jury during the progress of a trial, and which may influence their minds, is a subject of comment by counsel in their argument. The fact that defendant's wife was in the city was developed by the testimony; that she was not present in the court-room was an obvious fact; the witness who saw the defendant at or near Vian, as they testified, saw his wife there with him; and it would most certainly add to the force of their testimony if they could have said, We there saw not merely this defendant on trial, but this woman sitting by his side. Every man would feel surer of an identification which included two

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persons than if limited to but one. Some stress seems to be laid in the opinion of the court upon the fact that the defendant's wife was not a competent witness, and that this distinguishes the case from that cited from 14 Gray, and others in which the books abound. While it is true that she could not be sworn and called upon to give testimony, yet she was herself testimony, and material testimony. Take this illustration: Suppose one of the witnesses for the government in this case had testified that while with the defendant at Vian he had seen in his possession a knife of a peculiar make, had there taken it and made a mark upon it, and the government had proved by some other witness that he had seen in the possession of the defendant, on the very morning of the trial, a knife of substantially the same make, and no knife was produced by the defendant; would not the omission to produce that knife be a significant fact, and one which the prosecuting attorney was at liberty to comment upon? If produced, and bearing the mark described by the first witness, it would tend very strongly to support the identification. Just so if this wife of defendant had been in the court-room, and these various witnesses for the prosecution had testified that she was the same woman they had seen at Vian; can there be any doubt that the identification would have been more certain? So, because in the natural progress of the trial, without any misconduct on the part of the prosecution, this fact came to the notice of the jury, and was a fact which would naturally tend to affect the conclusions of men — it was a fact in respect to which the prosecuting officer was at liberty to comment, and suggest to the jury his own conclusions therefrom.

Again, the defence in this case was an alibi. The witnesses for the defence who testified to seeing the defendant in Washington County, Arkansas, at or about the time of the alleged murder testified that his wife was with him there; that they had seen her in the city of Fort Smith during the trial, and that she was the same woman with him theretofore in Washington County. It also appeared from the testimony of one witness that she had been in the hall of the court-house,

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and that, though in the city, she had not been around with the other witnesses.

Now, commenting upon the testimony, the counsel for the defence could argue to the jury that they had a double identification — that of the defendant and that of his wife — while the government had only one identification, that of the defendant. Was it not a legitimate argument for the district attorney to make in response to this that, if the wife had been in the court-room by the side of her husband during the trial, as ordinarily she would be expected to be, the government might have had a double identification equally with the defendant; and as the testimony further showed that she was in the city, that she came up into the hall of the court-house, and still was not around with the other witnesses for the defendant, so that the government witnesses might have had a chance to meet and see her — was it not also a legitimate argument, and was not the district attorney justified in making it, that there was probably a reason for her conduct, and that reason the danger of a double identification? The conclusion, it is true, cannot be positively affirmed to be correct; but surely a case ought not be reversed because the counsel for the government draws erroneous conclusions from the facts developed in the trial. If such a rule were laid down, how many verdicts could stand?

It must be borne in mind that there was nothing denunciatory, harsh, or abusive in the language of the district attorney. He simply commented upon the fact, obvious to the jury, that the wife of the defendant was not in the court-room, although shown by defendant's witnesses to be in the city, and drew his conclusions from such facts. The comment was one which would naturally occur to every man aware of the facts, whether on or off the jury. Can it be that the defendant was prejudiced by that? Ought the deliberate judgment of twelve men as to the defendant's guilt, approved as it was by the judge who presided, to be set aside for an error, if error it be, so frivolous as that?

For these reasons I dissent.

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RADER'S ADMINISTRATOR *v.* MADDOX.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

No. 54. Argued October 25, 26, 1893. -- Decided November 6, 1893.

A number of horses, mortgaged to secure the payment of a promissory note of their owner given to the mortgagee, were, under the provisions of a statute of Montana relating to chattel mortgages, sold by a sheriff on the maturity of the note without payment. With the assent of the attorney of the mortgagee, who was present at the sale, the purchaser paid a part of the purchase price in cash, and left the horses with the sheriff as security for payment of the remainder in five days. On the expiration of that time he failed to pay the balance. The attorney refused to receive the sum paid in cash and the horses as security for the remainder; but the principal received the amount paid in cash, and sued the sheriff and his bondsmen to recover the remainder. *Held*, that he could not repudiate the transaction in part and ratify it in part; and that having ratified it in part by the receipt of the sum paid in cash, he could not maintain this action.

THIS case came from the Supreme Court of the Territory of Montana, and presented the following facts: William Rader, one of the defendants in the case as commenced in the District Court of that Territory, was sheriff of Meagher County, Montana, and the other defendants were his bondsmen. Maddox and Gaddis were the owners respectively of two notes, given by P. D. Kinyon, and secured by a chattel mortgage on some four hundred horses. At that time there was in force in Montana the following statutory provision:

"It shall be lawful for the mortgagor of goods, chattels, or personal property to insert in his mortgage a clause authorizing the sheriff of the county in which such property or any part thereof may be, to execute the power of sale therein granted to the mortgagee, his legal representative and assigns, in which case the sheriff of such county, at the time of such sale, may advertise and sell the mortgaged property in the manner prescribed in such mortgage." Compiled Statutes of Montana, § 1550.

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Statement of the Case.

This mortgage contained the clause referred to in the statute. On the maturity of these notes, and on the 9th day of August, 1887, one N. B. Smith, an attorney at law, as attorney for Maddox, placed in the hands of sheriff Rader this mortgage, endorsed as follows:

"You are hereby authorized to execute the power of sale contained in a certain chattel mortgage, of which the within is a true copy.

"FLETCHER MADDOX & WILLIAM GADDIS,
"By N. B. SMITH, *Their Agent and Attorney.*"

Rader collected the horses, and advertised them for sale. At the day of the sale a party by the name of A. B. Kier was a bidder, and after some horses had been knocked down to him, Rader — no money having been paid — refused to receive any further bids. Thereupon Kier represented that he had in the bank $1752; agreed to turn that money over to the sheriff, and leave with him all horses that should be knocked down to him; and further, that if, in five days, he should not complete the payment, both money and horses should be forfeited. Neither Maddox nor Gaddis were present, but Smith their attorney was. The matter was referred to Smith, and he directed the sheriff to continue the sale and receive the bids of Kier. Horses to the amount of $8096.50 were struck off to Kier. The $1752 was deposited with the sheriff, and the horses were left with him. Kier failed to complete his purchase by the payment of the balance of the money. After the five days had expired, the sheriff tendered the $1752 and horses to Smith, for Maddox and Gaddis, but Smith declined to receive either. Thereafter, Maddox and Gaddis took the money, but declined to receive the horses. The sheriff received no other instructions, and after holding the horses for about a month turned them over to his bondsmen, and Maddox and Gaddis, one as plaintiff and the other as intervenor, brought this suit to recover the difference between $1752 and $8096.50. They obtained judgment in the District Court, which judgment was affirmed by the Supreme Court. *Maddox* v. *Rader*, 9

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Montana, 126. From that judgment the sheriff and his sureties brought the case here by both writ of error and appeal.

Mr. H. T. May, (with whom was *Mr. A. H. Garland* on the brief,) for plaintiffs in error and appellants.

Mr. Fletcher Maddox in person for defendants in error and appellees. *Mr. M. F. Morris* filed a brief for same.

Mr. James Hoban filed a brief for Gaddis, intervenor.

Mr. Justice Brewer delivered the opinion of the court.

On the trial of this case, all the testimony offered by the defendants to show the circumstances of the sale was on motion of the plaintiffs stricken out by the court. For the purpose of this hearing, therefore, it must be assumed that the facts were as this testimony tended to show that they were. The owners of these notes and mortgage were not present at the sale, but were represented by their agent and attorney, and by his direction the sheriff received the bids of Kier up to eight thousand dollars and upwards, and, as security for the completion of those purchases, retained all the property bid for, and in addition received $1752. The contention of the mortgagees is, that an attorney has, in the absence of special authority, no power to make a sale on credit, or to receive anything other than money on a claim placed in his hands for collection. Without questioning the truth of that proposition, it seems to us that it is inapplicable. No completed sale was made, no title passed; and while these horses were struck off to Kier, the transaction was evidently merely a conditional sale, to be perfected if, and only if, within five days the balance of the purchase money was paid.

But it is unnecessary to pursue any inquiry in this direction, for upon a very clear rule of law the mortgagees are estopped from maintaining this action. The arrangement, whether within or without the power of the attorney, was made and carried into effect by his directions, and it was an arrangement by which

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the proposed buyer deposited $1752 with the sheriff, as well as left with him the horses which he had attempted to purchase. If that transaction was beyond the power of the attorney, and the mortgagees were intending to repudiate it, they were bound to repudiate it *in toto*. They could not accept that which was beneficial, and avoid that which was burdensome. 1 Parsons on Contracts, (7th ed.,) 49 to 52, and cases cited in notes. It is urged, however, that it was the sheriff's duty to pay over the entire amount of the notes, and that the mere receiving from him of a part of that which it was his duty to pay did not work a ratification of any unauthorized proceedings by which he obtained that sum. This argument rests upon the assumption that a different rule obtains where the deposit by the proposed buyer is money, from that which would obtain if it were some other personal property. But can the question of ratification depend on the character of the deposits? If Kier had deposited a gold watch as security for the completion of his purchase, and the plaintiffs had received that from the sheriff, there would be no doubt that they had ratified the act of their attorney. Suppose that the deposit was a package whose contents were unknown, and that deposit was accepted by the plaintiffs; would it prove a ratification if, when opened, the contents turned out to be watches, and not a ratification if only money? It may be that this case turns somewhat on whether the sheriff and plaintiffs understood and intended that the payment of this money was in fact a transfer by him to them of the deposit, or merely a payment on account; but even if this be so, the question was one of fact to be settled by the jury, and should not have been disposed of by striking out all the testimony, and withdrawing the case from the jury. Kier parted with his property on the faith of this agreement between Smith and himself; and if it was unauthorized, and gave him no rights, he was entitled to a return of his deposit, whether that was a watch or money; and if the plaintiffs have taken from the sheriff this deposit, they have deprived him of the power to return it. It is unnecessary to hold that the horses became the property of plaintiffs. It is enough that they, by receiv-

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ing this deposit, have ratified the arrangement made by their attorney as to the sale which the sheriff was making, and if they desired a resale of the property they should have directed it. They cannot repudiate the action of their agent and attorney and treat the sheriff as having made a complete sale, when in fact he had not. When the money and horses were tendered to their attorney, he declined both. But they took the money, while declining to receive the horses, and failed to give any instructions to the sheriff as to further sale or otherwise. They assume to treat this as a completed sale to Kier, when in fact it was not, and when they have ratified what the sheriff did in respect thereto in obedience to the instructions of their agent and attorney by taking the deposit made by Kier.

The judgment must be reversed, and the case remanded for a new trial. As since it was brought to this court the Territory of Montana has been admitted as a State, and as no question of a Federal nature is presented, the case will be remanded to the Supreme Court of the State.

Reversed.

The CHIEF JUSTICE did not hear the argument or take part in the decision of this case.

MILLER'S EXECUTORS *v.* SWANN.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 362. Submitted October 23, 1893. — Decided November 6, 1893.

In this case the writ of error was dismissed because the judgment below rested upon a construction by the state court of a statute of the State, which was sufficiently broad to sustain the judgment.

THIS case came to this court on error from the Supreme Court of the State of Alabama. On the 3d of June, 1856, Congress made a grant of public lands to the State of Ala-

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bama to aid in the construction of certain railroads. 11 Stat. 17, c. 41. This grant was renewed and extended by an act of April 10, 1869. 16 Stat. 45, c. 24. By a joint resolution of the legislature of the State of Alabama, approved January 30, 1858, Acts 1857–1858, p. 430, certain railroad companies were made the beneficiaries of this grant. The Alabama and Chattanooga Railroad Company was formed by a consolidation, under the authority of the State, of two of these companies, and became thereby one of such beneficiaries. On February 11, 1870, an act was passed, Acts 1869–1870, No. 101, pp. 89 to 92, loaning two millions of dollars of the bonds of the State to this company, and providing for the execution of a mortgage by the company on all its property, including the land grant, to secure this loan. The bonds were delivered to the company, and on March 2, 1870, the mortgage called for by the last-named act was executed. Thereafter, the railroad company defaulting in the payment of its obligations to the State, was thrown into bankruptcy, and its property, including this land grant, was, on judicial sale, after proper proceedings in the District Court of the United States, purchased by the State in satisfaction of such obligations. The title thus acquired the defendants in error hold under a conveyance from the State made by virtue of what is called the "debt settlement" act of the general assembly, Acts 1875–1876, No. 38, pp. 130, 149, and they were proceeding to enforce their right to the lands in controversy in this suit by an action of ejectment.

The title of the plaintiffs in error arose in this way: Joab Bagley claimed to have purchased the lands in controversy from the Alabama and Chattanooga Railroad Company under two contracts, of date respectively September 13, 1870, and January 24, 1871, with one Daniel J. Duffy, its agent. There was some dispute in the testimony as to whether Duffy was duly authorized to act as the agent of the company, and also whether the company ever in fact received the money paid by Bagley; but for the purposes of this suit it may be assumed that Duffy was authorized to sell, and that the company received the moneys. No conveyance, however, was made by

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the company to Bagley. This suit was commenced in July, 1884, by D. B. Miller, who claimed under sundry mesne conveyances from Bagley, in the Chancery Court of Jefferson County, Alabama, against John Swann and John A. Billups, trustees, and others, the object of which was to enforce the specific performance of the two contracts of September 13, 1870, and January 24, 1871, and to enjoin the further prosecution of the action of ejectment. On the 20th of June, 1885, the chancellor entered a decree in favor of the complainant, which decree was reversed by the Supreme Court of the State. 82 Alabama, 530. An amended bill having been filed, the case was again submitted to the chancellor, who, on November 12, 1888, entered a decree dismissing the complainants' bill, which decree was affirmed by the Supreme Court on the 2d of May, 1890. 88 Alabama. Subsequently to the commencement of this suit, Miller died, and the suit was revived in the names of his executor and heirs. The two original trustees have also died, and Frank Y. Anderson and W. J. Cameron have been substituted as their successors.

Mr. Ellis Phelan for plaintiffs in error.

Mr. J. A. W. Smith for defendants in error.

Mr. Justice Brewer delivered the opinion of the court.

It is contended by defendants in error that, whatever questions may be found in the case, the decision of the Supreme Court of Alabama was upon a question not of a Federal character, and one broad enough to sustain the judgment, and, therefore, that this court has no jurisdiction, and should dismiss the case. *Hale* v. *Akers*, 132 U. S. 554; *Hopkins* v. *McLure*, 133 U. S. 380; *Blount* v. *Walker*, 134 U. S. 607; *Wood Mowing & Reaping Co.* v. *Skinner*, 139 U. S. 293; *Henderson Bridge Co.* v. *Henderson City*, 141 U. S. 679; *The Delaware City &c. Navigation Co.* v. *Reybold*, 142 U. S. 636.

As the mortgage to the State was executed some months before the contracts with Bagley, the title held by the State of Alabama under the bankruptcy proceedings would *prima*

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facie be paramount to that acquired by Bagley. *Wilson* v. *Boyce*, 92 U. S. 320. To avoid this, it was contended that, under the act of February 11, 1870, and the mortgage of March 2, 1870, the railroad company, the mortgagor, was given the right to sell these lands; and the question which was considered and determined by the Supreme Court of the State, and the vital question, was whether the act and mortgage gave such authority? The act of February, 1870, provided that "the said Alabama and Chattanooga Railroad Company shall have the privilege and right of selling said lands or any part thereof in accordance with the acts of Congress granting the same." The mortgage contained the same provision. In respect to this, the Supreme Court of the State thus expressed itself: "This reservation was incorporated in the mortgage, and its construction, as applied to the facts of the case, is the controlling question for us to decide. The power retained by the mortgagor was not an unlimited power to sell. It was a power to sell only in accordance with the terms and conditions of the act of Congress making the grant, which, we have said in a former decision, was 'a law as well as a grant.' If these terms and conditions were followed, then the lien of the mortgage was by agreement to be released. If they were not followed as to the mode or time prescribed or otherwise, then the contract of the parties is that the lien of the mortgage is to remain unaffected. Compliance with the essential requirements of the act of Congress became thus a condition precedent to the divestiture of title out of the State as mortgagee. This, we repeat, was the express contract between the parties. It is sufficiently shown in the former opinion in this case that the attempt to sell to Bagley was in direct violation of the terms of the law of Congress, and, therefore, necessarily also in violation of the agreement of the parties to the mortgage, which was based on that law. *Swann* v. *Miller*, 82 Alabama, 530. The lien of the mortgage for this reason remained undischarged. This we understand to be the natural and just construction of the mortgage agreement and of the act of the Alabama General Assembly, approved February, 1870, above cited."

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Section 4 of the act of Congress of June, 1856, is as follows:

"SEC. 4. *And be it further enacted*, That the lands hereby granted to said State shall be disposed of by said State only in manner following, that is to say: That a quantity of land, not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold; and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads, having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of such roads, may be sold; and so, from time to time, until said roads are completed; and if any of said roads is not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States."

These lands confessedly were not part of the first one hundred and twenty sections, which the State might sell prior to the construction of any portion of the road, and there is no pretence that at the time of these contracts of Bagley's any certificate had been made by the governor of the State to the Secretary of the Interior, as provided in the act. The Supreme Court, in its first opinion, held that, under the act of 1870 and the reservation in the mortgage, the railroad company had absolutely no power to sell until the making of that certificate; and that any attempted sale made prior thereto was a nullity, not voidable, but absolutely void. Now, whether that was a correct construction or not of the act of 1870 and the reservation of the mortgage, is a purely local question, and involves nothing of a Federal character. The question is not what rights passed to the State under the acts of Congress, but what authority the railroad company had under the statute of the State. The construction of such a statute is a matter for the state court, and its determination thereof is binding on this court. The fact that the state statute and the mortgage refer to certain acts of Congress as prescribing the rule and measure of the rights granted by the

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State, does not make the determination of such rights a Federal question. A State may prescribe the procedure in the Federal courts as the rule of practice in its own tribunals; it may authorize the disposal of its own lands in accordance with the provisions for the sale of the public lands of the United States; and in such cases an examination may be necessary of the acts of Congress, the rules of the Federal courts, and the practices of the Land Department, and yet the questions for decision would not be of a Federal character. The inquiry along Federal lines is only incidental to a determination of the local question of what the State has required and prescribed. The matter decided is one of state rule and practice. The facts by which that state rule and practice are determined may be of a Federal origin.

We see nothing in the cases of *St. Louis &c. Railway Co.* v. *McGee*, 115 U. S. 469, and *Doe* v. *Larmore*, 116 U. S. 198, conflicting with these views, or throwing any light on this question. These cases involved simply a consideration of the effect to be given to the later act of Congress, in respect to the rights of the State in the lands, and held that the later act was not to be considered as a new and independent grant, but simply as an extension of time.

Our conclusion, therefore, is that as the construction of the statute of 1870 and following mortgage presented no question of a Federal nature — as upon that construction the Supreme Court decided the case — and as such question is sufficiently broad to sustain the judgment, the case must be

Dismissed.

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COLORADO CENTRAL CONSOLIDATED MINING COMPANY *v.* TURCK.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 935. Submitted October 16, 1893. — Decided November 6, 1893.

This court exercises appellate jurisdiction only in accordance with the acts of Congress on that subject.

When the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the pleadings, that the suit is one of that character, of which the Circuit Court could properly take cognizance at the time its jurisdiction is invoked.

When the jurisdiction of a Circuit Court is invoked solely on the ground of diverse citizenship, the judgment of the Circuit Court of Appeals is final, although another ground for jurisdiction in the Circuit Court may be developed in the course of subsequent proceedings in the case.

THIS was an action in ejectment brought by John Turck against the Colorado Consolidated Mining Company, December 2, 1885, in the Circuit Court of the United States for the District of Colorado. The complaint alleged:

"First. That plaintiff is a resident and citizen of the State of Colorado; that the Colorado Central Consolidated Mining Company, defendant, is a corporation organized and existing under and by virtue of the laws of the State of New York; that the amount in dispute in this action exceeds the sum of $500 exclusive of costs.

"Second. Plaintiff further alleges that upon the first day of January, A.D. 1885, he was the owner of, seized in fee and entitled to the possession of a certain lode mining claim and premises, situate in Argentine mining district, Clear Creek County, Colorado, described as follows, to wit: The Aliunde Tunnel lode, No. 2, with all the dips, spurs, angles and variations of said lode throughout their entire length and depth, and all other lodes, veins, ledges or deposits of mineral, the top or

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apex of which lie inside of said Aliunde Tunnel lode, No. 2, as patented to John Turck by certain letters patent of the United States, dated the 31st day of January, A.D. 1883, which lode, mining claim and premises are described in said patent as mineral entry No. 1862 in the series of the United States land office at Central City, Colorado, and designated by the surveyor-general of the State of Colorado, as survey lot No. 1494, which lode is fifteen hundred feet in length, by one hundred and fifty feet in width.

"Third. That said Aliunde Tunnel lode, No. 2, has a pitch to the northwest of about sixty degrees from a horizontal; that the top and apex of said lode lies within the side and end lines of said Aliunde Tunnel lode, No. 2; that owing to the dip of said lode to the northwest, at a depth of about three hundred feet beneath the surface of the ground, said Aliunde Tunnel lode, No. 2, passes under the north side line of said patent and enters the land adjoining; that while plaintiff was so seized and possessed of said Aliunde Tunnel lode, No. 2, the defendant afterwards, and on the 1st day of January, A.D. 1885, wrongfully entered upon and ousted the plaintiff from about four hundred feet of said Aliunde Tunnel lode, No. 2, mining claim and premises next hereinafter described, and now wrongfully withholds the same from plaintiff, that is to say: That said defendant wrongfully ousted the plaintiff from so much of said Aliunde Tunnel lode, No. 2, mining claim and premises as lies beneath the depth of three hundred feet beneath the surface of the ground north of the north side line of said Aliunde Tunnel lode No. 2, carrying said north line down vertically, and from thence on the pitch of said lode northwesterly, and measuring thence along the line of said Aliunde Tunnel lode, No. 2, a distance of four hundred feet next west of the northeast end line of said claim."

That plaintiff owned the property in fee, and was entitled to possession, and that the value of the rents, issues, and profits, "while said plaintiff has been excluded therefrom by the defendants, amounts to two hundred and fifty thousand dollars." Wherefore judgment was demanded for possession, damages, and costs.

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Statement of the Case.

The defendant answered by a general and special denial, and for a second defence said:

"1. That it is, and ever since the 15th day of December, A.D. 1879, it hath been, the owner and seized in fee and in the actual possession of the Colorado Central lode mining claim survey, lot No. 261, being a lode mining claim 1500 feet in length by 50 feet in width, and of all lodes the tops or apexes of which may be found within the lines of said survey, lot No. 261.

"2. That said Colorado Central lode mining claim was entered for patent and patented by the United States to the grantors of defendant before said date and long before the real or pretended discovery, location or patenting of said Aliunde Tunnel lode, No. 2.

"3. That said Colorado Central lode mining claim lies immediately to north of and adjoining the survey lot of said Aliunde Tunnel lode, No. 2, and that whatever vein the defendant has worked on is the vein of the Colorado Central lode, or some vein having its top or apex within the side lines of said survey lot No. 261, and not within the side lines of the survey lot of said Aliunde Tunnel lode, No. 2."

And by the fourth paragraph defendant denied that it wrongfully withheld possession from plaintiff of the Aliunde lode, or any vein having its apex within the side lines thereof.

Plaintiff replied to this second defence, denying the defendant's ownership in the Colorado Central lode to the extent averred; admitting the second paragraph of the answer that the Colorado Central lode was patented before discovery and patent of the Aliunde, and that the two lodes lay adjoining each other; but denying that the Aliunde lode was a part of the Colorado Central lode, and that the vein of the plaintiff had its top or apex within the side lines of the Colorado Central lode, at any point claimed by the plaintiff, and denying that defendant had not wrongfully withheld possession.

The case went to trial and resulted in a verdict for the plaintiff and judgment thereon, which was set aside on payment of costs, under the local statute, and a second trial was had with the same result. Certain exceptions were taken by

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the defendant to parts of the charge of the court and to the refusal to give certain instructions requested. The case was taken by writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, and the judgment was affirmed, May 8, 1892. A petition for rehearing was filed during the term, which was denied February 18, 1893, and thereupon a writ of error was allowed to this court.

The opinions of the Circuit Court of Appeals will be found in 4 U. S. App. 290, 50 Fed. Rep. 888, and 54 Fed. Rep. 262.

The case was submitted on motion to dismiss or affirm.

Mr. Willard Teller and *Mr. H. M. Orahood* for the motion.

Mr. Simon Sterne, *Mr. C. J. Hughes*, and *Mr. R. S. Morrison* opposing.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

From *Wiscart* v. *D'Auchy*, 3 Dall. 321, to *American Construction Co.* v. *Jacksonville &c. Railway Co.*, 148 U. S. 372, it has been held in an uninterrupted series of decisions that this court exercises appellate jurisdiction only in accordance with the acts of Congress upon that subject.

By the Judiciary Act of March 3, 1891, it is provided that the review by appeal, by writ of error, or otherwise, from existing Circuit Courts shall be had in this court, or in the Circuit Courts of Appeals thereby established, according to the provisions of the act regulating the same. The writ of error in this case was brought under section six of that statute, which provides that "judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States," and also that "in all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs." 26 Stat. 826, 828, § 6, c. 517.

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If the judgment of the Circuit Court of Appeals for the Eighth Circuit was final, under the section in question, then this writ of error must be dismissed. And in order to maintain that the decision of the Circuit Court of Appeals was not final, it must appear that the jurisdiction of the Circuit Court was not dependent entirely upon the opposite parties being citizens of different States.

Under the act of March 3, 1875, 18 Stat. 470, c. 137, Circuit Courts of the United States had original cognizance of all suits of a civil nature at common law or in equity, among others, where the matter in dispute exceeded, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or in which there was a controversy between citizens of different States.

This complaint was filed December 2, 1885, and alleged the diverse citizenship of the parties as the ground of jurisdiction. But it is said that the vital question raised in the case was whether the patentee of a lode claim, whose discovery and patent were later than the date of another's patent, may follow his junior patented lode, the apex thereof being within his side lines, into the other's patented ground on the dip; and that the solution of this question depended upon the construction and application of section 2322 of the Revised Statutes, concerning the dip and apex of lodes. Hence that the suit really and substantially involved a controversy only to be determined by reference to the Federal statute, and that jurisdiction existed on that ground and did not depend entirely upon the other.

To maintain this proposition, it is contended that reference may be made to the entire pleadings, the evidence, or the rulings of the courts below.

This view, however, ignores the settled doctrine that the inquiry, in cases such as this, into the jurisdiction of the Circuit Court, is limited to the facts appearing on the record in the first instance. This has been often so held in the enforcement of the inflexible rule which requires this court in the exercise of its appellate power to deny the jurisdiction

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of courts of the United States in all cases where such jurisdiction does not affirmatively appear in the record on which it is called upon to act.

And we do not think we can do better in elucidation of the rule than quote from the opinion of the court in *Metcalf* v. *Watertown*, 128 U. S. 586, 588, where the subject is considered and the authorities cited.

"It has been often decided by this court," said Mr. Justice Harlan, by whom that opinion was delivered, "that a suit may be said to arise under the Constitution or laws of the United States, within the meaning of that act, [18 Stat. 470, c. 137,] even where the Federal question upon which it depends is raised, for the first time in the suit, by the answer or plea of the defendant. But these were removal cases, in each of which the grounds of Federal jurisdiction were disclosed either in the pleadings, or in the petition and affidavit for removal; in other words, the case, at the time the jurisdiction of the Circuit Court of the United States attached, by removal, clearly presented a question or questions of a Federal nature. *Railroad Co.* v. *Mississippi*, 102 U. S. 135, 140; *Ames* v. *Kansas*, 111 U. S. 449, 462; *Pacific Railroad Removal Cases*, 115 U. S. 1, 11; *Southern Pacific Railroad Co.* v. *California*, 118 U. S. 109, 112. Besides, the right of removal under the act of 1875 could not be made to depend upon a preliminary inquiry as to whether the plaintiff had or had not the right to sue in the state court of original jurisdiction from which it was sought to remove the suit. When, however, the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the court, upon demurrer or motion, or upon its own inspection of the pleading, must dismiss the suit; just as it would remand to the state court a suit which the record, at

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the time of removal, failed to show was within the jurisdiction of the Circuit Court. It cannot retain it in order to see whether the defendant may not raise some question of a Federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction, at the commencement of the suit, is not cured by an answer or plea which may suggest a question of that kind."

The jurisdiction of the Circuit Court was invoked, December 2, 1885, by the filing of the complaint, from which it appeared that the suit was one of which cognizance could be properly taken on the ground of diverse citizenship, but it did not appear therefrom that jurisdiction was rested, or could be asserted, on any other ground. The Federal question now suggested did not emerge until the defendant set up its second defence, and not then unless deducible from the bare averment that it claimed under the senior discovery and patent, which was admitted in the replication.

The proposition that the right given by section 2322 of the Revised Statutes to the holder of the apex to follow his vein on its dip outside of the side lines of his claim is merely a right against an adjoining claimant holding under a junior patent or certificate was afterwards advanced in certain instructions requested by defendant and refused.

The jurisdiction had, however, already attached and could not be affected by the subsequent developments. It depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred.

If the plaintiff had invoked it on two distinct grounds, one of them being independent of diverse citizenship, a different question might have been presented.

We are of opinion that the judgment of the Circuit Court of Appeals was final under the sixth section, and that the writ of error cannot be maintained.

Writ of error dismissed.

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UNITED STATES v. THE LATE CORPORATION OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 887. Submitted October 27, 1893.— Decided November 6, 1893.

Congress having, by joint resolution approved October 25, 1893, declared the uses to which the property of the Mormon Church should be devoted, the court remands this case for further proceedings in the Supreme Court of the Territory in conformity with the provisions of that resolution.

THIS was a motion for a decree. The case is stated in the opinion.

Mr. Franklin S. Richards for the motion.

Mr. Solicitor General watched the case on behalf of the United States.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

When this case was before the court on the former appeal, 136 U. S. 1, it was adjudged that Congress had the power to repeal the act of incorporation of the Church of Jesus Christ of Latter-day Saints, and that having done so, and the corporation having been dissolved, its property, in the absence of any other legal owner, devolved to the United States, subject to be disposed of according to the principles applicable to property devoted to religious and charitable uses; the real estate, however, being also subject to a certain condition of forfeiture and escheat contained in an act of Congress of July 1, 1862, 12 Stat. 501, and that Congress, as the supreme legislature of the Territory of Utah, had full power and authority to direct the winding up of the affairs of the Church of Jesus Christ of Latter-day Saints as a defunct corporation,

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and to order its property to be applied to lawful religious and charitable uses, conformable as near as practicable to those to which it was originally dedicated, which power was distinct from that which might arise from the forfeiture and escheat of the property under the act of 1862.

The decree of the Supreme Court of the Territory of Utah, then under consideration, was in the main affirmed, with a modification in the seventh clause thereof, the decree of this court in the premises being as follows:

"The decree entered in this case on the 19th day of May, 1890, having been set aside by an order of the court made on the 23d day of May, 1890, it is now upon further consideration ordered, adjudged, and decreed, that the decree of the Supreme Court of the Territory of Utah be affirmed with the following modification, that is to say, that the seventh clause of said decree be changed and modified so as to read as follows:

"[7th. And the court does further adjudge and decree that the late corporation of the Church of Jesus Christ of Latter-day Saints having become by law dissolved as aforesaid, there did not exist at its dissolution, and do not now exist, any trusts or purposes within the objects and purposes for which said personal property was originally acquired, as hereinbefore set out, whether said acquisition was by purchase or donation, to or for which said personalty or any part thereof could be used, or to which it could be dedicated, that were and are not, in whole or in part, opposed to public policy, good morals, and contrary to the laws of the United States; and, furthermore, that there do not exist any natural persons or any body, association, or corporation who are legally entitled to any portion of said personalty as successors in interest to said Church of Jesus Christ of Latter-day Saints, and the said personal property has devolved to the United States; and not being lawfully applicable to the purposes for which it was originally dedicated or acquired, and to which, at the commencement of this suit, it was being devoted by the said corporation and its controlling authorities, the same ought to be limited and appointed to such charitable uses, lawful in their character, as may most nearly correspond to those to which it was origi-

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nally destined, to be ascertained and defined (unless in the meantime Congress should otherwise order) by reference to a master for due examination, inquiry, and report thereon, subject to the approval of the court; and to be established, administered, and carried out in such manner and according to such scheme as may be suggested and reported by said master and approved by the court. It is further ordered and decreed that until the ascertainment and determination of such uses and the adoption of such scheme, and until direction be taken for the ultimate funding or investment of the said personal property for the purposes aforesaid, the receiver appointed in this cause do continue in the custody and charge thereof, with all accumulations, subject to the further order of the court, and (conjointly with the rents and income of the real estate) to the payment of the costs and expenses of this proceeding and of the receivership aforesaid. The reference herein provided for to be made by a separate order.]

"Whereupon it is considered, adjudged, and decreed that the cause be remanded to the Supreme Court of the Territory of Utah, with directions to modify its decree as herein directed, and to take such further proceedings as to law and justice may appertain in conformity with the opinion of this court delivered on this appeal at the last term of the court." 140 U. S. 665.

The mandate of this court having gone down, further proceedings were had in the Supreme Court of the Territory of Utah, which resulted in the entry of the following order or decree by that court on November 12, 1892, to wit:

"This cause having come on to be heard before this court at a former day of this term upon exceptions to the master's report filed herein on the 19th day of October, 1891, and the same having been argued by counsel for the respective parties and submitted to the court, and the court being now fully advised in the premises, it is hereby ordered, adjudged, and decreed that the scheme for the disposition of the fund in controversy, reported and suggested to this court for adoption by the master in his said report, be, and the same is, disapproved and rejected.

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"And it is further ordered, adjudged, and decreed that said fund, and the whole thereof, be, and the same is hereby, vested in Leonard G. Hardy, in trust, to be by him invested to the best advantage, having in view the security of the fund as well as the income to be derived from the investment.

"And to collect and receive the proceeds of all such investments and to apply such proceeds, or such portion thereof, and so much of the principal from time to time as may be necessary for that purpose, to the support and aid of the poor members of the Church of Jesus Christ of Latter-day Saints, and to the building and repairing of houses of worship for the members of said church.

"And it is further ordered, adjudged, and decreed that the said Leonard G. Hardy be required to give a bond to the government of the United States in the sum of five hundred thousand ($500,000) dollars, to be approved by this court, or the chief justice thereof, and to be conditioned for the faithful performance of his duties as such trustee.

"And it is further ordered, adjudged, and decreed that the said Leonard G. Hardy, as such trustee, be, and he is hereby, required to make a report to this court on the first day of January of each year of his administration of said trust."

From this decree an appeal was taken by the United States to this court. The appellee now moves that the decree of the court below be reversed, and a decree entered here, in effectuation of the terms of a joint resolution of Congress approved October 25, 1893; and that the cause be remanded to the court below with instructions to take such further proceedings as may be necessary to carry into effect such decree of this court. Due notice having been given, the United States, without opposing or consenting to the motion, submitted the matter to the court, stating that the government did not appear to have any further interest in the cause, the subject-matter involved having been disposed of by the joint resolution of Congress, but suggesting that the case should be remanded to the Supreme Court of the Territory of Utah for such decree there as might be proper to be made therein.

By the resolution of Congress referred to it was: "*Resolved*

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by the Senate and House of Representatives of the United States of America in Congress assembled, That the said personal property and money now in the hands of such receiver not arising from the sale or rents of real estate since March third, eighteen hundred and eighty-seven be, and the same is hereby, restored to the said Church of Jesus Christ of Latter-day Saints, to be applied under the direction and control of the first presidency of said church to the charitable uses and purposes thereof: That is to say: For the payment of the debts for which said church is legally or equitably liable, for the relief of the poor and distressed members of said church, for the education of the children of such members, and for the building and repair of houses of worship for the use of said church, but in which the rightfulness of the practice of polygamy shall not be inculcated. And the said receiver, after deducting the expenses of his receivership, under the direction of the said Supreme Court of the Territory of Utah, is hereby required to deliver the said property and money to the persons now constituting the presidency of said church, or to such person or persons as they may designate to be held and applied generally to the charitable uses and purposes of said church as aforesaid."

It will be perceived that judicial action is not sought to be controlled by the resolution, but that this court having indicated the mode to be pursued to ascertain and define the particular charitable uses, lawful in their character, to which the property should be devoted, in the absence of legislation upon the subject, and this appeal from the decree of the court below to that end having been taken, Congress has now declared such uses. This disposition of the property by the United States renders any further consideration of the case here unnecessary, and the decree below is

Reversed and the cause remanded to the Supreme Court of Utah Territory for such further proceedings as to law and justice may appertain, in conformity with the provisions of the aforesaid resolution of Congress.

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Statement of the Case.

In re PARSONS, Petitioner.

In re NININGER, Petitioner.

ORIGINAL.

No number. Submitted October 23, 1893. — Decided November 6, 1893.

This court cannot, by writ of mandamus, compel a court below to decide a matter before it in a particular way.

This court cannot, through the instrumentality of a writ of mandamus, review the judicial action of a court below, had in the exercise of its legitimate jurisdiction.

THESE were applications for leave to file petitions for writs of mandamus against the judge of the District Court of the United States for the Middle and Northern Districts of Alabama, commanding him to vacate certain orders made and entered by him June 20, 1893, while holding the Circuit Court for the Southern Division of the Northern District of Alabama, as to each of said petitioners, and hereinafter set forth, and to reinstate petitioners in the offices of United States attorney and United States marshal for the Northern District of Alabama, respectively. As the petitions, proceedings, and orders complained of are the same, *mutatis mutandis*, the particulars of but one application need be stated.

It appears from the petition of Lewis E. Parsons, Jr., and the accompanying record, that on June 20, 1893, at a regular term of the Circuit Court for the Southern Division of the Northern District of Alabama, Emmet O'Neal presented and filed his application or motion as attorney of the United States for the Northern District of Alabama, stating that he had theretofore been recognized by the court as such attorney, duly commissioned and qualified, and representing that he had, as United States attorney, demanded of Parsons, "the former incumbent of said office, the possession and custody of the books, papers, and property belonging to the said office, and that the said Lewis E. Parsons, Jr., had refused and de-

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clined to surrender or deliver up the same, but, by his counsel, had in open court announced he would decline and refuse to surrender the same without being ordered so to do by the court." Wherefore he moved the court for an order requiring the said Parsons forthwith to turn over and deliver to him, as the attorney for the United States, the books, papers, and property pertaining to or belonging to that office, taking his receipt as such attorney therefor.

Notice of this application was given and accepted on the same day, and thereupon Parsons demurred to the motion upon the grounds that the Constitution or laws of the United States did not confer on the President the authority to remove Parsons from the office of United States district attorney and to appoint O'Neal; that the Constitution did not confer the power of appointment or removal during a recess of the Senate; that the court had no jurisdiction to make the order prayed for; that "there are no pleadings, or papers, or suit, or due process of law to authorize the order prayed for in the motion;" "that the said court had no jurisdiction or authority to recognize the said Emmet O'Neal as stated in said motion, and that there were no pleadings, suit, or due process of law to authorize the said court to recognize the said Emmet O'Neal as United States attorney in said motion." The demurrer was overruled and Parsons excepted, and thereupon filed his answer to the motion, averring that he was duly appointed and commissioned by the President of the United States on the 4th of February, 1890, United States attorney for the Northern District of Alabama, his commission authorizing and empowering him to perform the duties of that office for the term of four years from its date, which term was fixed by law; that shortly after he qualified and entered upon the discharge of the duties of the office and had performed them up to the present time; that he had never resigned said office; that he now resided, and had continued to reside since the date of his commission, within the Northern District of Alabama, and had given his personal attention to the duties of the office, and no cause of vacancy now existed, or had existed, since his appointment; that he had faithfully performed the

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duties of the office in strict accordance with law; that on May 29, 1893, he received a communication from the President of the United States, dated May 26, purporting to remove him from office, which communication is set out; that he had had no notice of any charge whatever having been preferred against him prior to May 29, 1893, and had not yet had notice of any charge; that he replied June 5, 1893, to the President, (which reply is set out,) stating that he was advised by counsel, and that it was his own opinion, that the President had no power to remove him, and that he respectfully declined to surrender the office; and that he had notified the Attorney General of the United States, and Emmet O'Neal, who was named by the President as his successor, and whose appointment bore date May 26, 1893, that he declined to surrender the office.

Respondent further answered that he had continued in the possession of the office from the time he had entered on the duties thereof, and now here in open court he claimed the right to, and that his duty required of him that he should, represent the United States in all civil and criminal cases pending, and perform all other duties required of him by law as United States attorney, and requested the court so to permit him to represent the United States and discharge the duties of the office; "that the said O'Neal was never recognized as United States attorney by this court until yesterday, and such recognition was without any suit for such purpose, and in view of the facts herein set out, the said respondent appearing at the time, asking to be allowed to perform his duties as such U. S. attorney; that this court has no jurisdiction to adjudicate the right to said office in any proceeding in court, and the mere fact that this court has heretofore recognized the said Emmet O'Neal as the United States attorney does not constitute him such attorney."

The respondent also assigned as causes of objection and demurrer that the court had no jurisdiction to make the order; that the respondent claimed to have a vested right to the office for the full term covered by his commission, and the court had no jurisdiction to deprive him thereof "in the man-

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ner wherein it is claimed he recognized the said O'Neal as United States attorney," etc. In support of this answer the respondent introduced his commission as attorney of the United States bearing date February 4, 1890, in the usual form, the letter from the President of May 26, 1893, and his reply thereto. He was then examined in his own behalf, and testified that on the opening of the court, June 19, 1893, he was present in court and objected and protested against the recognition of O'Neal as United States attorney, and also on that day offered himself to perform the duties of that office; that he was appointed United States attorney in June, 1889, and soon thereafter entered upon the discharge of his duties, and on the 4th of February, 1890, was confirmed by the Senate, and since then had given his personal attention to the duties of the office, residing then and since in Birmingham, in the Northern District of Alabama, and that he was ready, and offered, to continue in the discharge of the duties of the office, and had declined to surrender the office to O'Neal on his demand for the same, O'Neal claiming to have been appointed May 26, 1893, and the demand and refusal having been since that date.

The court considered, in connection with the evidence introduced by the respondent, the commission of O'Neal under which he had duly qualified, which was exhibited to the court on the 19th of June, 1893, when he was recognized as United States attorney. This commission bore date May 26, 1893, and appointed O'Neal the attorney of the United States for the Northern District of Alabama in due form. This being all the evidence, the court entered the following order:

"Now comes Emmet O'Neal, district attorney of the United States for the Northern District of Alabama, and represents and shows to the court that he has demanded of Lewis E. Parsons, Jr., the former United States district attorney for said district, the possession and custody of the books, papers, and property belonging to the said office, and that the said Lewis E. Parsons, Jr., has refused to surrender the same; and the said Emmet O'Neil now moves the court for an order to require the said Lewis E. Parsons, Jr., to surrender and turn

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over to him the possession and custody of said books, papers, and property, and counsel for the respective parties being heard: It is considered by the court that the said Lewis E. Parsons, Jr., the former United States district attorney for the Northern District of Alabama, do forthwith, or as soon as practicable, turn over and deliver to the said Emmet O'Neal, as district attorney of the United States for the Northern District of Alabama, all the books, papers, and property pertaining or belonging to the said office of district attorney of the United States for the Northern District of Alabama, taking the receipt of the said Emmet O'Neal, district attorney for the United States for the Northern District of Alabama."

To which action of the court respondent duly excepted.

On the following day petitioner again appeared in the Circuit Court and filed a petition praying that the court enter an order or judgment declaring the commission issued to O'Neal to be invalid; that petitioner be put in possession of the books, papers, etc., appertaining to the office of United States attorney, and that the order of June 20 be set aside; and thereafter, July 15, moved the court to set the matter down for hearing, which the court declined to do, and refused to entertain the same, to which petitioner excepted, and the petition and motion were then withdrawn.

In the case of Nininger, the order required the transfer of the custody of prisoners to Musgrove, the new appointee, as well as that of the books, papers, and property pertaining to the office of United States marshal. The remarks of the court, June 19, 1893, will be found reported, 57 Fed. Rep. 293.

Mr. J. A. W. Smith and *Mr. David D. Shelley* for the motion.

Parsons and Nininger were in the possession of the offices under color and claim of title, and had the right to perform the duties thereof until the question of title could be adjudicated in some proper proceeding instituted for that purpose. The only proceeding by which the title to a Federal office can

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be tried is by *quo warranto* in the name of the United States as plaintiff. *Wallace* v. *Anderson*, 5 Wheat. 291; *Territory of Nebraska* v. *Lockwood*, 3 Wall. 236; *Miners' Bank* v. *United States*, 5 How. 213.

Petitioners having been wrongfully deprived of their offices by the court without due process of law, and in which they have *vested* rights, *Marbury* v. *Madison*, 1 Cranch, 137, are entitled to a mandamus requiring the lower court to vacate the orders made and to reinstate them in office. *Ex parte Bradley*, 7 Wall. 364; *Ex parte Robinson*, 19 Wall. 505; *In re Hennen*, 13 Pet. 230.

Especially is this true in view of the fact that *they* are powerless to use the name of the United States to institute a *quo warranto* by which to have the question adjudicated.

Mr. Solicitor General opposing.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

The Circuit Court dealt by its orders with the possession of certain books, papers, and property, and the custody of certain prisoners, and while in so doing O'Neal and Musgrove were recognized as United States attorney and marshal, respectively, the court did not thereby undertake to determine the title to those offices. If the orders be regarded merely as directions in the administration of judicial affairs in respect of the immediate possession of property or custody of prisoners, we cannot be properly called on, by reason of anything appearing on these records, in the exercise of appellate jurisdiction in this manner, to direct them to be set aside. And if the proceedings should be treated as involving a final determination as on issue joined of the right to such possession and custody, there was no complaint of want of notice or of hearing, and the summary mode adopted did not in itself affect the jurisdiction of the Circuit Court upon the ground that it had exceeded its powers. Without intending to intimate that the orders would have any effect, and if so, what, on appropri-

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ate proceedings to try title to these offices, it is enough that in our judgment the Circuit Court had jurisdiction to enter them. We cannot by writ of mandamus compel the court below to decide a matter before it in a particular way, nor can we, through the instrumentality of that writ, review its judicial action had in the exercise of legitimate jurisdiction. *Ex parte Flippin*, 94 U. S. 348; *Ex parte Burtis*, 103 U. S. 238; *In re Morrison*, 147 U. S. 14, 26; *In re Hawkins, Petitioner*, 147 U. S. 486, 490; *American Construction Co.* v. *Jacksonville, Tampa &c. Railway Co.*, 148 U. S. 372, 379, 386; *In re Humes, Petitioner*, 149 U. S. 192.

These settled principles control the applications before us, and it follows that they must be

Denied.

MORSE *v.* ANDERSON.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

No. 63. Submitted November 2, 1893. – Decided November 6, 1893.

The verdict in this case was returned December 16, 1887, and judgment entered thereon on the same day. On the next day ten days were granted for filing a bill of exceptions, which time was extended from time to time but expired before April 1, 1889, when they were signed. ***Held***, that the allowance of this bill of exceptions was not seasonable.

THE record contains, in addition to the record of the trial, the entry of judgment, and the offers of exceptions, the following certificate from the presiding judge:

"At the request of the counsel of plaintiffs in the case of *N. C. Morse, Jr., and others* v. *John Jay Anderson and others*, I make this statement:

"I presided at the trial of the case at the December term, 1887, of the court, held at Covington. The trial was concluded December 17, 1887, when the counsel of plaintiffs asked

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and obtained ten days' time within which to file their bill of exceptions. They tendered to me at Louisville, my residence, a bill of exceptions on the 24th day of December, 1887, which was ordered to be noted of record in the court at Covington, and plaintiffs were given until January 20, 1888, in which to complete their bill of exceptions so tendered.

"I examined the bill of exceptions thus tendered and declined to sign it, and had counsel notified of the refusal. I sent with my refusal a written memorandum to the clerk at Covington, by way of suggestions to counsel, as an aid in preparing a bill of exceptions. This was about January 13, 1888, and on the 14th of January, 1888, an order of court was entered, extending the time within which another bill of exceptions could be prepared and tendered to the 15th of March, 1888.

"Some time during the spring of 1888 and, I think, before March 15, 1888, one of plaintiffs' attorneys, Hon. Thomas F. Hargis, presented to me at Louisville another bill of exceptions. I examined it and said to him that it did not conform to my suggestions theretofore given. He replied that he thought it did, and that he had a copy of my suggestions which he would send or bring to me, I do not remember which. He also said, as I now remember, that he would come to see me soon and when I was at leisure, and we would talk the matter over and have the bill of exceptions settled. Judge Hargis sent by mail a copy of my memorandum, but not the bill of exceptions, that I remember of; but he did not see me further in regard to the matter. I wrote to the clerk of the court to enter an order extending the time to tender a bill of exceptions until the second day of the next term of the court, which was May 15, 1888; which was done by an order of March 12, 1888.

"My recollection is not distinct as to the exact time I saw the second bill of exceptions, but I am sure it was prior to the May term, 1888, of the court. I did not see it again, nor did Judge Hargis or any one else appear before me again in regard to said bill of exceptions. The plaintiffs made a motion for a new trial at the December term, 1887, of the court, which

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motion was taken under consideration and not disposed of until the 3d day of May, 1888, when the motion as to John Jay Anderson was overruled, and granted as to the other defendants.

"On the first day of the regular term, May term, 1888, I entered another order extending the time within which to present a bill of exceptions to the 18th day of June, 1888, and on the 18th day of June, 1888, extending the time to present a bill of exceptions to July 2nd, 1888. (The term of the court continues from term to term, as we construe the law.) Since the commencement of the December term, 1888, plaintiffs' counsel has made various efforts to have the counsel of defendant Anderson present and before me, so that a bill of exceptions might be prepared and signed, but owing to sickness in the family of counsel this has been impracticable until the bill of exceptions now signed by me as of April 1st, 1889.

"JOHN W. BARR, *Judge.*"

Mr. Thomas F. Hargis for plaintiffs in error.

No appearance for defendant in error.

THE CHIEF JUSTICE: The judgment is affirmed, for want of bill of exceptions seasonably allowed, upon the authority of *Müller* v. *Ehlers*, 91 U. S. 249; *Jones* v. *Grover & Baker Sewing Machine Co.*, 131 U. S. Appx. cl.; *Michigan Insurance Bank* v. *Eldred*, 143 U. S. 293; *Glaspell* v. *Northern Pacific Railroad Co.*, 144 U. S. 211; *Hume* v. *Bowie*, 148 U. S. 245.

Judgment affirmed.

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Counsel for Appellant.

EMPIRE COAL AND TRANSPORTATION COMPANY *v.* EMPIRE COAL AND MINING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

No. 60. Submitted October 25, 1893. — Decided November 6, 1893.

A bill in equity in the Circuit Court of the United States in Tennessee, by a corporation organized under the laws of the State of Kentucky, against another company described as a corporation organized under the laws of that State and having its principal office in the district in which the suit was brought, and against five individuals, citizens of a county within that district, prayed "that the parties named as defendants be made such," and for a reconveyance and an account of property of the plaintiff, alleged to have been fraudulently caused by the individual defendants to be conveyed to the defendant corporation, and to have been wasted and injured by all the defendants. The individual defendants demurred for want of jurisdiction. The plaintiff thereupon, by leave of court, filed an amended bill, which "refers to the original bill and its prayer, and makes the same a part hereof, as if set out herein *in hæc verba*;" and further alleged that the individual defendants, in pursuance of their fraudulent scheme, pretended to procure from the State of Kentucky a charter under the name of the company "which is the same corporation mentioned in the original bill," and caused the plaintiff's property to be conveyed "to said pretended corporation," but this company was never lawfully organized, and the individual defendants controlled it and were doing business as a partnership under its name; and prayed that the parties defendants to the original bill be made defendants to this amended bill, and that the individual defendants be made defendants as partners under the name of the company, and be made to account personally and individually. *Held*, that this company, as a corporation of Kentucky, was a party defendant to the amended bill of the plaintiff, likewise a Kentucky corporation; and that the amended bill must therefore be dismissed for want of jurisdiction.

THE case is stated in the opinion.

Mr. A. H. Garland and *Mr. H. J. May* for appellant.

No appearance for appellees.

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MR. JUSTICE GRAY delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the Middle District of Tennessee, (within which lie the city of Nashville and the county of Davidson,) by which a bill in equity, after having been twice amended, and the plaintiff having declined to amend further, was dismissed on demurrer for want of jurisdiction, because it showed that the plaintiff and one of the defendants were corporations of the State of Kentucky, and alleged no ground of jurisdiction except the citizenship of the parties.

The sole plaintiff is the Empire Coal and Transportation Company, a corporation incorporated and duly organized under the laws of the State of Kentucky. The principal question in the case is whether the Empire Coal and Mining Company is a party defendant to the second amended bill.

The original bill, filed April 6, 1886, named as defendants "the Empire Coal and Mining Company, a corporation organized under the laws of the State of Kentucky, and whose principal office is in Nashville, Tennessee," and five individuals, "all citizens of Davidson County, Tennessee;" alleged that those individuals, being directors and stockholders in the plaintiff corporation, by conspiracy and fraud, and through various conveyances and transactions particularly set forth in the bill and the exhibits thereto annexed, caused all its coal lands and other property to be conveyed to one of them, and "procured to be incorporated the defendant, the Empire Coal and Mining Company, for the purpose of mining, &c., with its principal office located at Nashville, Tennessee, under and by virtue of an act of the legislature of Kentucky," of which they were and had since been the stockholders and directors, and, upon its organization, caused him to convey to it, as such corporation, all the plaintiff's property, and that the defendant corporation, as well as the other defendants, wasted and greatly injured that property. The bill prayed "that the parties named as defendants be made such, and be required to answer," and for a reconveyance of the property, an account, an injunction and further relief, against all the defendants.

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That the Empire Coal and Mining Company, as a corporation of Kentucky, was a party defendant to the bill as originally framed, cannot be doubted.

An amended bill, filed October 26, 1886, alleged that "the Empire Coal and Mining Company is but the creature of" the individual defendants, "who own all its pretended stock, rights, and franchises," and "was brought into existence by them as a part of the fraudulent scheme heretofore set out," and "is insolvent, and has nothing more than the nominal possession of" the plaintiff's property, and that all the profits thereof had been appropriated by the individual defendants; and prayed that they, "all citizens of Davidson County and within the jurisdiction of this court, and the said so-called Empire Coal and Mining Company, having its principal office and officers in Davidson County, Tennessee, and within the jurisdiction of this court, be made defendants, and be served with process, and be required to answer," and that "the pretended conveyance" of the plaintiff's property from one of them "to the so-called Empire Coal and Mining Company be declared held in trust for complainant, and that said Empire Coal and Mining Company be declared to be invested with such title as it may have in trust for the complainant," and for other specific and general relief against all the defendants. The bill, as thus amended, still treated the Empire Coal and Mining Company as an existing corporation of Kentucky, and as a party defendant.

On November 24, 1887, a demurrer of the individual defendants was sustained, and the bill ordered to be dismissed for want of jurisdiction, unless the plaintiff should so amend "as to dismiss as to all defendants who are citizens of the same State with itself."

The second amended bill, filed by leave of court on January 5, 1888, repeats the allegations of the first amended bill as to the Empire Coal and Mining Company; and further states and charges that the individual defendants, in further pursuance of their fraudulent scheme, and for the purpose of better concealing their frauds and wrong doings, "pretended to procure from the State of Kentucky a charter under the name and

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style of the Empire Coal and Mining Company, which is the same corporation mentioned and referred to in the original and amended bills; and said defendants conveyed to said pretended corporation all the properties belonging to complainant and mentioned in said bills and converted by said defendants, as stated, to their own use and benefit;" "that no organization was ever had or attempted to be had in the State of Kentucky, which is required by the laws of that State; but that all the meetings of the so-called directors of said pretended corporation were held in the city of Nashville, Tennessee, and the principal office located in said city;" and "therefore charges that in no sense is said corporation legally and validly organized, but that said five defendants still hold and possess all complainant's property, rights, and privileges, as set out in said bills, and that said corporation is nothing more than a partnership owned and controlled by said five defendants, who are all citizens of Tennessee, and are doing business under the name and style of the Empire Coal and Mining Company." In this last bill, the plaintiff prays "that the party defendants to its original and amended bills, heretofore filed in this cause, be made defendants to this amended bill," and that the five individuals aforesaid "be made defendants as partners doing business under the name and style of the Empire Coal and Mining Company, and that proper and necessary process issue to this end;" and that "they be made to account personally and individually, as prayed in this and the original and amended bills; and that the title to said properties be declared to be held by said defendants, whether in their own name or under the name of the Empire Coal and Mining Company, for the use and benefit of complainant, and that the title to said property be divested, and vested in complainant;" "and for such other and further relief as to equity may belong."

Moreover, which is significant and decisive, each of the amended bills not only recites the substance of the original bill, but expressly "refers to said original bill, its prayer and exhibits thereto, and makes the same a part hereof, as if set out herein *in hæc verba*." The original bill, as has been seen, made the Empire Coal and Mining Company, as a corporation

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organized under the laws of Kentucky, a party defendant, in the description of the parties, in the body of the bill, and in the prayer for relief.

The conclusion is irresistible, that the bill, as finally amended, is so framed as to hold this company, and all the members thereof, whether it is a corporation or only a partnership; and, therefore, that this company, as a Kentucky corporation, is a party defendant to the second amended bill of the plaintiff (likewise a Kentucky corporation) as well as to each of its former bills, and might have been held liable as such, had the suit proceeded to a decree for the plaintiff.

Such being the case, as shown by the record, its decision is not difficult, but it is governed by well-settled rules. By the Constitution and laws of the United States, the jurisdiction of the Circuit Courts, on the ground of the citizenship of the parties, extends only to suits between citizens of different States; and within the meaning of those laws, as construed by this court, a corporation is a citizen of that State only, by which it is created. By the act of March 3, 1875, c. 137, § 1, (in force when the original bill and the first amended bill were filed,) permitting, in "a controversy between citizens of different States," a person to be sued in any district in which he either was an inhabitant or was found, a corporation might indeed be sued in any State in which it did business and had an agent, provided, always, it was not a citizen of the same State with the plaintiff. Under the act of March 3, 1887, c. 373, § 1, (in force when the second amended bill was filed,) providing that "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant," a corporation, incorporated in one State only, cannot be compelled to answer in another State in which it has a usual place of business, and of which the plaintiff is not a citizen. But, under either statute, if the parties are not citizens of different States, there is an entire want of jurisdiction, which cannot be waived by the parties, but will be noticed by the court of its own motion. 18 Stat. 470; 24 Stat. 552; *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, and

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Syllabus.

cases there collected; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202; *Wolfe* v. *Hartford Ins. Co.*, 148 U. S. 389.

The two corporations on the opposite sides of this case being corporations of the same State, neither of them could maintain an action against the other in a Circuit Court of the United States, whether held in that State or in any other State, even if the defendant had a place of business in the latter. The second amended bill was therefore rightfully dismissed for want of jurisdiction, even if it should be treated as controlled by the act of 1875; and it is unnecessary to consider whether that act or the act of 1887 defines the jurisdiction over this bill, filed after the passage of the latter act.

Decree affirmed.

HOWARD *v.* DETROIT STOVE WORKS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 64. Argued November 2, 3, 1893. — Decided November 13, 1893.

The alleged invention patented in letters patent No. 123,142, issued January 30, 1872, to Philo D. Beckwith for "an improvement in stoves," was anticipated by prior patents and is void for want of invention in not describing how wide the flange should be in order to accomplish the desired result.

Letters patent No. 135,621, issued February 11, 1873, to Philo D. Beckwith for "novel improvements in a stove," are void because the bolting or riveting together of sections of a stove was well known at the time of the alleged invention, and the use of lugs with holes perforated through them was anticipated in other stoves and furnaces manufactured many years prior to the date of the patent.

Letters patent No. 206,074, issued to Philo D. Beckwith, July 16, 1878, for a "new and useful improvement in stove grates," is void because the claims in it were clearly anticipated, and because it involved no invention to cast in one piece an article which had formerly been cast in two pieces and put together, nor to make the shape of the grate correspond with that of the fire-pot.

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Opinion of the Court.

In equity, for the infringement of letters patent. Decree dismissing the bill, from which complainants appealed. The case is stated in the opinion.

Mr. W. G. Howard for appellants.

Mr. George H. Lothrop for appellee.

Mr. Justice Jackson delivered the opinion of the court.

This suit was brought by appellants' testator, Philo D. Beckwith, against the appellee for the alleged infringement of three letters patent, viz.: No. 123,142, issued January 30, 1872; No. 135,621, issued February 11, 1873; and No. 206,074, issued July 16, 1878, all for improvements in heating stoves. The defences set up and interposed were that the patents were all void for want of novelty and patentable invention. Pending the suit the patentee died, and the cause was revived and proceeded in the name of his executors. The court below dismissed the bill and complainants appeal to this court to reverse that decree.

The first patent, issued January 30, 1872, relates to an improvement in stoves, wherein an exposed fire-pot section, cylindrical in shape and tapering downwardly, is fitted into the upper end of a hollow ash-pit section. This fire-pot has formed on the inner side of its lower end an annular flange on which the grate rests. The theory of the patent is that this flange, which may be cast on, or made separate from, the fire-pot and riveted or otherwise fastened to it, is made of such a width that it will collect upon it a bank of ashes, which will have the effect of preventing undue expansion of the fire-pot at the point of junction with the ash-pit. Or, in other words, the collection of ashes on the flange will prevent such an expansion of the lower end of the fire-pot as would cause it to leave its seat on the ash-pit and expose an open joint at this point. The inventor stated in his application that he had found that the expansion of the fire-pot is so great without the flange that the stove proves a failure; but with the flange

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cast on it at the point designated above, the joint will remain tight during the lifetime of the stove. The novelty involved in the patent consists entirely of the tapering cast-iron fire-pot with the annular flange or shelf formed on its inside lower end at the point where it joins the ash-pit, and upon which flange the grate rests. The single claim is "the tapering cast-iron section B with the flange or shelf *c* framed on it, as described and shown."

It was claimed by the appellee that this feature of the invention was so common in actual stove construction at the time the patent was issued as to be deemed obvious, and that prior patents, attaining the same results, had been granted which practically covered the same design or contrivance included in this particular patent. In support of this contention it was shown that a patent had been issued to Benjamin Brownell, on September 18, 1868, for a soft coal hot-air furnace, in which it appears from the drawings set out in the record that a tapering fire-pot is one of the elements of his invention, although it is not described in the specification. The drawings also indicate, and it was established by expert testimony, that this tapering fire-pot had a flange on the inside lower end, upon which the grate rests. At the trial a model of the Brownell patent was introduced in which it was shown that the model differed from the patent drawings in having the projecting flange at the lower end of the fire-pot formed on the ash-pit, instead of on the fire-pot.

The appellee further showed that a patent was issued to A. Atwood, May 14, 1850, No. 7356, which has a flange projecting under the lower edge of the fire-pot as wide as the outer rim of the grate. This flange is upon the ash-pit and not upon the fire-pot. A patent issued to Bush & Richards, No. 171,129, November 19, 1867, shows a construction like the Atwood patent, except that the fire-pot is tapering.

It therefore appears in these three patents offered by the appellee in support of its contention that the invention of the appellants had been anticipated, that they contain a clear and accurate representation of the contrivance of the Beckwith patent; that even if the flange was formed on the ash-pit

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instead of on the fire-pot, it was the equivalent thereof, because it performed the same function in the same way; and that the only function of the flange would be to collect a ring or bank of ashes at the base of the fire-pot when the stove was in use.

If there is any material difference between the patent under consideration and those just discussed, it is found in the width of the flange. The appellants lay particular stress upon the fact that the width of the flange in the Beckwith patent — which was to serve the primary purpose of permitting a bank of ashes to form upon it which would have the effect of preventing the lower part of the fire-box from becoming unduly heated — is greater than shown in the previous patents; but neither in the specification nor claim of the patent does the patentee indicate what shall be the width of this flange. The description of the invention is vague and indefinite, and is not sufficient to enable those skilled in the art to construct it without experiment so as to attain the desired result. The width of the flange is a mere matter of degree, and if at the time of the invention the proper width of the flange to accomplish the purpose desired was known, then the patentee made no invention. If the proper width was not known at that time, it should have been described in the patent; but as the patent is silent on this point, except that the drawings indicate that the width of the outside rim of the grate is the proper width for the flange, it can hardly be said under such circumstances that the vague and indefinite description of the width of the flange elevates it to the dignity of invention, for it has been shown that the stoves covered by the patents just discussed also had each a flange which performed the same function, although not specifically claimed in the patents. We think it is obviously apparent that the patent of appellants' testator has not only been anticipated, but that it is wanting in all of the elements of patentable novelty.

The next patent to be considered is No. 135,631, issued February 11, 1873. This patent is for improvements in wood stoves, and consists of the construction, combination, and arrangements of the various coöperating devices comprising the parts of the stoves by joining them together with short

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bolts or rivets, adapted to lugs or flanges, instead of long rods which, when exposed to the fire, are liable to be burned off several times during the life of the stove. The claims are four in number, but the third is not claimed to be infringed. The general form of the fire-pot is the same as in the former patent, including the internal flange, which, it is alleged, now performs a triple function, viz.: collecting ashes, as before; supporting the grate, as before, and securing the ash-pit to the fire-pot by means of bolts or rivets passing through holes in the flange. The three claims in controversy are as follows:

"1. The section A (ash-pit) and section B (fire-box) constructed and secured together by means of bolts or rivets, and the internal flange *b*, substantially as described.

"2. The sheet-metal section C, (body of the stove,) fitted into the fire-pot section B, and secured thereto by means of bolts or rivets, substantially as described.

"4. The top-plate or section G, secured to the section F, by means of lugs and bolts, or rivets, as set forth."

The first claim of this patent is the same as covered by the former patent of Beckwith, except that the fire-box and the ash-pit in the former patent were not bolted together. The second and fourth claims are also found in the prior patent, except that the parts are not riveted together, and the top-plate, or section G of claim 4, has in the older patent an annular depending flange entering the lower section instead of lugs. In the present patent the flange is shown riveted to the lower section.

It is shown conclusively by letters patent issued to J. H. Keyser, March 19, 1867, No. 62,961, and by No. 114,614, issued May 9, 1871, to Samuel Smith, and by patent No. 127,535, issued to H. Whittingham, that it was common to secure the various sections of stoves together by bolts and rivets, and unimpeached testimony shows that the Barstow Stove Company of Providence, R. I., since 1856, has made a stove in which a cast-iron top and base are provided with lugs, through which holes are drilled for the purpose of riveting the sheet-iron body of the stove to the top and base. These claims, in view of the state of the art, limited the novelty to the use

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of bolts and rivets, and it is too plain for discussion, or the citation of authorities, that this does not involve invention.

The third patent, No. 206,074, issued July 16, 1878, which the appellants claim has been infringed, contains two claims, both of which are in controversy, and, substantially, is for the invention of a circular grate having a thin closed portion, a thick open portion, strengthened by ribs, and with a toothed periphery opposite the open part of the grate. It appears from the record that a patent, No. 76,315, was issued to Mary E. A. W. Evard, on April 7, 1868, which describes a grate with a closed back and open front, and the drawing in the patent clearly shows that the open front is thicker than the closed back, and forms ribs on the closed back. The only difference between this grate and the one under consideration is that the Evard one is rectangular to fit a rectangular fire-box, while the Beckwith grate is circular to fit a circular fire-box. The prior use of the elements contained in this patent is conclusively shown. The Rambler grate answers the first claim, except that both the open and closed parts are of the same thickness. The North American and Morning and Evening Star grates answer the first claim literally, except that they are rectangular instead of circular, and provided with holes in the plate part of the grate, where the Beckwith grate has none. At the date of this invention it was common to make wood-burning grates partly open and partly closed, with teeth at their ends, which serve exactly the same purpose as the teeth D of the patent. These grates are all used in cooking stoves, and are rectangular in form, while the Beckwith patent is circular in shape, but it cannot be maintained that there is any element of invention in making the grate fit the particular fire-box of the stove to be constructed. To accomplish that end mechanical skill alone is necessary, and does not call for the exercise of inventive talent.

The appellants urge that the word "periphery" is a word of limitation confined to a circular grate. However this may be, it is conclusively shown that the Monumental grate, which was in public use five years before application was made for the patent under consideration, contains all the elements of

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the Beckwith grate, except that, being adapted for burning coal, it is cast in two pieces, while the Beckwith grate is cast in one piece. This does not involve patentable invention.

Our conclusions are, that as to the first patent it was anticipated by prior patents, and is void for want of invention in not describing how wide the flange should be in order to accomplish the desired result. As to the second patent, it is void because the bolting or riveting together of sections of a stove was well known at the time of the invention, and the use of lugs with holes perforated through them was anticipated in other stoves and furnaces manufactured many years prior to the date of the patent. As to the third patent, it is void because the claims in it were clearly anticipated, and because it involves no invention to cast in one piece an article which has formerly been cast in two pieces and put together, nor to make the shape of the grate correspond with that of the fire-pot.

Our opinion is that the judgment of the court below dismissing the bill should be

Affirmed.

MR. JUSTICE GRAY was not present at the argument, and took no part in the decision.

CAREY *v.* HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

No. 912. Submitted October 23, 1893. — Decided November 13, 1893.

Oral argument is not allowed on motions to dismiss appeals or writs of error.

On motion to dismiss or affirm it is only necessary to print so much of the record as will enable the court to act understandingly without referring to the transcript.

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Statement of the Case.

In order to bring an appeal from the judgment of a Circuit Court taken since the Judiciary Act of March 3, 1891, 26 Stat. 826, c. 517, went into effect, within the first of the six classes of cases specified in § 5, of that act, viz., "in any case in which the jurisdiction of the court is in issue," the jurisdiction of the Circuit Court below must have been in issue in the case, and must have been decided against the appellants, and the question of jurisdiction must have been certified; but the court does not now say that the absence of a formal certificate would necessarily be fatal.

The fifth section of that act does not authorize a direct appeal to this court in a suit upon a question involving the jurisdiction of the Circuit Court over another suit previously determined in the same court.

A bill in equity to impeach and set aside a decree of foreclosure of a railroad mortgage, on the ground of fraud, and to prevent the consummation of a scheme for reorganization, is a separate and distinct case from the foreclosure suit, and no question of jurisdiction over that suit, or over the rendition of the decree passed therein, can be availed of to sustain an appeal to this court from a decree of a Circuit Court under the provisions of the first class of the six cases specified in § 5 of the act of March 3, 1891.

In order to hold an appeal from a judgment or decree of a Circuit Court to this court to be maintainable under the fourth class of said section 5, viz., "any case that involves the construction or application of the Constitution of the United States," the construction or application of the Constitution must be involved as controlling, although on the appeal all other questions might be open to determination.

STEPHEN W. CAREY, a citizen of New Jersey, and several other persons, citizens of New York and Great Britain respectively, who sued as stockholders of the Houston and Texas Central Railway Company in their own behalf and in behalf of others similarly situated, filed their bill, December 23, 1889, and an amended bill, March 3, 1890, in the Circuit Court of the United States for the Eastern District of Texas, against the Houston and Texas Central Railway Company (No. 1), the Houston and Texas Central Railroad Company (No. 2), the Central Trust Company of the city of New York, and the Farmers' Loan and Trust Company, corporations organized under the laws of New York, and a number of other corporations and individuals, citizens of Kentucky, Texas, New York, and Louisiana, seeking to vacate and set aside, upon the ground of collusion and fraud, and want of jurisdiction, a decree of foreclosure and sale entered by that

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court on May 4, 1888, in certain suits pending therein and consolidated as one suit, to foreclose certain mortgages upon the property of that company, and to enjoin and restrain the defendants from carrying out a certain plan of reorganization, and issuing any stock or securities of the new company incorporated pursuant to such plan.

The amended bill alleged that the Houston and Texas Central Railway Company between July 1, 1866, and April 1, 1881, executed seven mortgages or deeds of trust to different trustees as security for bonds issued by it, and averred that, prior to 1883, the defendant Huntington, who, with his associates, controlled the Southern Development Company, a corporation of California, formed a syndicate with his associates for the purpose of acquiring in his own interest and that of the Southern Development Company the control of the Houston and Texas Central Railway Company, and that, having obtained such control, the rights of the holders of the stock should be effectually shut out and barred, and the absolute control be acquired by the syndicate, so that the railway might be run solely in its interest and that of the Southern Pacific Company. The bill then set up in detail certain proceedings alleged to be fraudulent and collusive, which culminated in the decree complained of and a sale thereunder, and proceeded:

"Complainants further allege that, as they are advised and believe and charge, the said decree was and is absolutely invalid and void and beyond the power of the court to grant; that there was no foundation for said decree or jurisdiction in the court to award it, and that the same was entered by consent and agreement, and without any investigation or adjudication by the court, but was the result of agreement simply, and was procured, as complainants allege on information and belief, by collusion and fraud on the part of said Huntington and his associates and the directors and officers of said Houston and Texas Central Railway Company, and was and is a part of the scheme to acquire possession of said railway in the interest of said Huntington and the said Southern Pacific Company, without regard to the rights or interests of the holders of the stock of said company No. 1, and in direct dis-

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regard of the provisions and terms of the mortgages; that the defences interposed that the principal of the mortgages had not become due and that the said railway could not be sold without a sale first of the lands and the other defences interposed were substantially abandoned and withdrawn as part of the said wrongful and fraudulent scheme herein referred to; that the said defences were never submitted to the court for adjudication or determination, nor was evidence heard or offered to sustain the same, but the decree was the result of the agreement which the bondholders had made with the said Southern Pacific Company and Central Trust Company, and the rights of the stockholders were not considered or protected by any of the parties to the record in said cause, nor submitted to the court for adjudication or investigation, nor were the stockholders in any way advised or permitted to be informed of the transaction herein complained of.

"Complainants further allege that, as they are advised and believe, the said decree is void for the further reason that there was and is in the said decree no finding by the court fixing the amount due from the Houston and Texas Central Railway Company (No. 1) under said several mortgages at and prior to the recording of the said decree, and fixing the amount which the said company was required to pay to redeem its franchises, property, and rights from the lien of the said mortgages, nor was there nor has there been any judicial inquiry into that matter, and that the said decree contradicts the provisions of the several mortgages set up in the bills asking foreclosure, and is non-judicial and void."

Further averments followed in relation to the organization of the Houston and Texas Central Railroad Company, designated as No. 2, for the purpose of operating the railroad acquired at the sale, and the intention to issue mortgage bonds and place them upon the market, etc.

The prayer of the bill was that the decree rendered by the court below on May 4, 1888, in the consolidated cause, be vacated and set aside, and adjudged and decreed to be fraudulent, collusive, illegal, and void, and that complainants be permitted to intervene and become parties defendant in said

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suit, and to be heard and defend the same; that the sale of the railroad and lands of the Houston and Texas Central Railway Company, No. 1, under said decree be vacated and set aside, and the said railway and lands be restored to the possession of the receivers appointed by the court; that the defendants be enjoined temporarily and perpetually from executing, delivering, or recording any mortgage upon the property of the company referred to in said decree, and from issuing, alienating, or parting with any shares of stock of the new or reorganized Houston and Texas Central Railroad Company, No. 2, or any bonds secured by mortgage upon any property claimed to be possessed by said company, or any stock or bonds issued or intended to be issued pursuant to said reorganization agreement, and for further relief.

The defendants answered, denying the allegations upon which complainants sought to impeach the decree in the foreclosure proceedings against the Houston and Texas Central Railway Company, and in respect of the other transactions referred to in the bill, and asserted the regularity, integrity, and good faith of all the proceedings therein assailed. Replications were filed, and evidence was taken on both sides. An injunction *pendente lite* was moved for and denied. 45 Fed. Rep. 438.

March 15, 1892, the cause was set down for final hearing on the pleadings and proofs, and on November 16, 1892, the Circuit Court entered a final decree dismissing the bill as to all the defendants. The opinion of the court will be found in 52 Fed. Rep. 671. On December 3, 1892, complainants prayed two appeals from this decree, one to this court and one to the Circuit Court of Appeals for the Fifth Judicial Circuit, which appeals were severally allowed. Citations were signed and appeal bonds duly approved and filed, together with an assignment of errors on each appeal.

No question as to the jurisdiction of the Circuit Court was certified to this court by that court for decision, nor was any application made to the Circuit Court for such certificate so far as appeared from the record.

A motion to dismiss the appeal having been made by appel-

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Argument against the Motion.

lees, appellants objected that the extracts from the record printed by appellees in support of their motion were insufficient for its proper decision, and moved for a postponement of the consideration of the motion and to be allowed to make oral argument.

Mr. J. Hubley Ashton, *Mr. Charles H. Tweed*, and *Mr. Adrian H. Joline* for the motion to dismiss.

Mr. Jefferson Chandler and *Mr. A. J. Dittenhoefer*, opposing.

I. The extracts from the record, filed by the appellees in support of their motion, show upon their face that vital portions have been omitted essential to be considered by the court in the determination of the merits of the motion. Where the papers upon a motion to dismiss an appeal do not contain the record proper and essential for the consideration of such motion, it will not be entertained. *National Bank* v. *Insurance Co.*, 100 U. S. 43; *Crane Iron Co.* v. *Hoagland*, 108 U. S. 5; *Waterville* v. *Van Slyke*, 115 U. S. 290.

II. If the court determines to entertain the motion to dismiss the appeal upon the extracts from the record, we respectfully submit that that motion cannot prevail.

The question of jurisdiction of the court below is in issue, and is the issue which was decided by the court below against the appellants, and to review which this appeal was taken and allowed. The bill herein was filed to review (in the only way permissible by equity procedure) the jurisdiction of the court to grant a decree under which appellants were divested of their property. The bill directly tendered the issue of the want of jurisdiction in the court to grant the decree attacked. It was claimed, and, as we contend, proven, that the court acted without jurisdiction; that there was not the requisite diversity of citizenship in the parties to the foreclosure suit, as appears on the face of the record; that the decree entered was a consent decree, and not the result of judicial procedure; that no evidence whatever as to the issues raised was taken and no hearing had, and by the terms thereof the mortgages which

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were foreclosed were violated, disregarded and overridden, the pleadings in the suit were contradicted, and, as appears from the face of this so-called record and decree, over five million dollars were directed to be paid, not due in any event, and over twenty-one million dollars of debt directed to be paid years before it matured.

The bill herein was aimed at the jurisdiction of the court below to do this. The appellees joined issue with us on this question of jurisdiction by denying that there was want of power in the court to do what it did do.

A bill of review, or a bill in the nature of a bill of review, whose object is to arrest or reverse judicial proceedings for an abuse of judicial power or for defects therein and want of conformity to law by the court in taking such proceedings, or for want of jurisdiction in the court to entertain and carry on proceedings appearing on the face of them to be attacked, puts in issue the grounds of attack made upon such proceedings set up in the bill of review, or bill in the nature of a bill of review; such a bill is a continuation of the proceedings attacked. *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1; *Krippendorf* v. *Hyde*, 110 U. S. 276; *Dewey* v. *West Fairmont Coal Co.*, 123 U. S. 329; *Johnson* v. *Christian*, 125 U. S. 642; *Pacific Railroad* v. *Missouri Pacific Railway*, 111 U. S. 505.

Such a bill is essentially a writ of error, as its object is to procure an examination and alteration or reversal of the decree made upon the former bill. It may be brought for errors of law appearing upon the face of the decree. It is ground for a bill of review that the decree was not warranted by the allegations in the bill. *Goodhue* v. *Churchman*, 1 Barb. Ch. 596. For the purpose of examining all errors of law on the face of the decree, the bills, answers, and other proceedings are as much a part of the record before the court as the decree itself, for it is only by comparison with the former that the correctness of the latter can be ascertained. *Dexter* v. *Arnold*, 5 Mason, 303; *Hollingsworth* v. *McDonald*, 2 H. & J. 230; *Webb* v. *Pell*, 3 Paige, 368; *Whiting* v. *Bank of the United States*, 13 Pet. 6. And as, in a proceeding to review

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a judgment for error of law, when the judgment is reversed an appeal from such judgment of reversal lies, *Keepfer* v. *Force*, 86 Indiana, 81, so an appeal from a judgment on a bill of review will lie wherever an appeal in the original case which it is sought to have reviewed will lie. *Klebar* v. *Corydon*, 80 Indiana, 95.

III. The appellants contend, and, as we claim, the record shows, that they have been deprived of their property without due process of law. The decree attacked was placed upon file by the unlawful consent of the directors of the defendant railway company, and in violation of their trust. The directors had no power or jurisdiction to change the terms of the mortgages involved in the foreclosure proceedings, either by consenting to a decree of foreclosure or by any other action of the board collectively or individually. The record shows that the entire procedure resulting in this so-called decree was non-judicial and without due process of law, and the application of the Constitution is directly involved in this appeal, as appears from the record certified to this court.

IV. There was no jurisdiction in the court below to precipitate the payments of the contracts of the defendant company in advance of their maturity on the ground of the insolvency of the said company.

V. The case has been properly certified to this court and the issue of jurisdiction duly certified.

The form of the certificate in this case is the one, we are advised, that has been adopted in the various Circuits in transmitting records to this court under the act of 1891, including cases where the appeal or writ of error is taken to bring up the questions of jurisdiction. The appeal having been taken and allowed, it becomes the duty of the court below, through its clerk, to certify the record, and by the act of 1891, the court is required only to certify the record showing the issue of jurisdiction. When, therefore, that record is sent to this court with the certificate attached, presumably the court has followed the directions of the act, and has certified what was deemed necessary to review the decision upon the issue of jurisdiction.

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In the case of *McLish* v. *Roff*, 141 U. S. 661, cited upon the appellee's brief, the record was certified in the form the record is in this case. In that case it appears also that counsel especially requested the court to make a specific certificate certifying the question of the jurisdiction involved for review by this court. That was denied, and then a writ of error was sued out in the ordinary way, and the record certified as in this case.

The assignment of errors presented to the learned trial judge below, upon which the application for the allowance of this appeal was made, sets forth that the issue of jurisdiction, as well as the application of the Constitution of the United States, was sought to be reviewed by this court on the appeal intended to be taken, and the appeal was allowed by the trial judge, and, as part of the record, the assignment of errors was certified by him through the clerk of the court.

But the improper certification of the record — assuming there be an imperfection — presents no reason for dismissing the appeal. The right to appeal to this court under section 5 of the act of 1891 is absolute where the jurisdiction of the court is in issue, or in any case that involves the application of the Constitution of the United States. The right being absolute, and the appeal having been taken and allowed, it cannot be dismissed because the clerk or court below has not properly certified the record. If the record is not complete, or if the certificate be not in proper form, the remedy is to correct the record or certificate, not to dismiss an appeal which has been properly taken, and to which the appellant is entitled as a matter of right. *United States* v. *Adams*, 6 Wall. 101.

VI. The assertion of appellees that an appeal is now pending in the Circuit Court of Appeals is no ground for dismissing an appeal properly taken to this court.

Appellant's counsel have inquired of every Circuit Court of Appeals in the United States to learn the practice under the circumstances involved in this case, and find no uniform rule yet established in respect of it.

It is respectfully submitted, therefore, that, under any view that may be taken of the case, the appeal herein ought not to be dismissed on this ground.

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Opinion of the Court.

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

Oral argument is not allowed on motions to dismiss appeals or writs of error, and we perceive no reason for making an exception to the general rule in the case before us.

On motion to dismiss or affirm it is only necessary to print so much of the record as will enable the court to act understandingly without reference to the transcript. *Walston* v. *Nevin*, 128 U. S. 578. Appellees have printed the original and amended bills; the answer and replications; the opinion of the circuit judge in disposing of the case; the final decree; the two appeals and proceedings thereon; and the assignments of errors in both courts. This was quite sufficient for the purposes of the motion.

The Judiciary Act of March 3, 1891, in distributing the appellate jurisdiction of the national judicial system between the Supreme Court and the Circuit Court of Appeals therein established, designated the classes of cases in respect of which each of these courts was to have final jurisdiction, (the judgments of the latter being subject to the supervisory power of this court through the writ of *certiorari* as provided,) and the act has uniformly been so construed and applied as to promote its general and manifest purpose of lessening the burden of litigation in this court. The fifth section of the act specifies six classes of cases in which appeals or writs of error may be taken directly to this court, of which we are only concerned with the first and fourth, which include those cases "in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision;" and "any case that involves the construction or application of the Constitution of the United States."

In order to bring this appeal within the first of these classes, the jurisdiction of the Circuit Court must have been in issue in this case, and, as appeals or writs of error lie here only from final judgments or decrees, must have been decided against appellants; and the question of jurisdiction must have

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been certified. We do not now say that the absence of a formal certificate would be fatal, but it is required by the statute, and its absence might have controlling weight where the alleged issue is not distinctly defined. This record contains no such certificate, nor was it applied for, nor does it appear that the jurisdiction of the Circuit Court was in issue. Appellants by filing their bill invoked the jurisdiction of the court below over the entire case, the defendants did not contest that jurisdiction, and the court adjudicated accordingly. This is conceded, but it is contended that the question of jurisdiction was in issue because the bill attacked the jurisdiction of the Circuit Court over the foreclosure suit, or its jurisdiction to make the decree of foreclosure and sale of May 4, 1888, passed in that suit. But the fifth section of the act of March 3, 1891, does not authorize a direct appeal to this court in a suit upon a question involving the jurisdiction of the Circuit Court over another suit previously determined in the same court. It is the jurisdiction of the court below over the particular case in which the appeal from the decree therein is prosecuted, that, being in issue and decided against the party raising it and duly certified, justifies such appeal directly to this court. This suit to impeach the decree of May 4, 1888, and to prevent the consummation of the alleged plan of reorganization, was a separate and distinct case, so far as this inquiry is concerned, from the suit to foreclose the mortgages on the railroad property; and no question of jurisdiction over the foreclosure suit or the rendition of the decree passed therein can be availed of to sustain the present appeal from the decree in this proceeding.

The collusion and fraud charged in the institution and conduct of the prior litigation, and in the procurement of the decree against the railway company, and in the other transactions in respect of which relief was sought against the defendants, seem to form the gravamen of the case; but whether the bill be treated as a bill of review, an original bill of the same nature, or an original bill on the ground of fraud, it was a distinct proceeding in which the moving parties were shifted, and the fact that it put in issue the jurisdiction in the proceed-

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ings it assailed would not change the appeal from this, into an appeal from the prior decree.

In order to hold this appeal maintainable as within the second of the above-named classes, (the fourth class in the enumeration of the statute,) the construction or application of the Constitution of the United States must be involved as controlling, although on appeal or error all other questions would be open to determination, if inquiry were not rendered unnecessary by the ruling on that arising under the Constitution. *Horner* v. *United States*, 143 U. S. 570.

The bill before us refers to no provision of the Constitution upon which complainants relied to invoke the action of the court in vindication of their supposed rights, or which was presented to be construed or applied by the court. No question upon such construction or application was raised between the parties upon the record, or determined by the decree of the Circuit Court.

It is argued that the record shows that complainants had been deprived of their property without due process of law, by means of the decree attacked, but because the bill alleged irregularities, errors, and jurisdictional defects in the foreclosure proceedings, and fraud in respect thereof and in the subsequent transactions, which might have enabled the railroad company upon a direct appeal to have avoided the decree of sale, or which, if sustained on this bill, might have justified the Circuit Court in setting aside that decree, it does not follow that the construction or application of the Constitution of the United States was involved in the case in the sense of the statute. In passing upon the validity of that decree the Circuit Court decided no question of the construction or the application of the Constitution, and, as we have said, no such question was raised for its consideration. Our conclusion is that the motion to dismiss the appeal must be sustained.

Appeal dismissed.

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Citation for Appellee.

HEDGES *v.* DIXON COUNTY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

No. 62. Submitted November 2, 1893. — Decided November 13, 1893.

Holders of municipal bonds, issued by a county in excess of its authority, cannot, by an offer to surrender and cancel so much of such bonds as may, upon inquiry, be found to exceed the limit authorized by law, invest a court of equity with jurisdiction to ascertain the amount of such excess, and to declare the residue of such bonds valid and enforce the payment thereof against the county.

Where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce it, or, in the absence of fraud, accident, or mistake to so modify it as to make it legal, and then enforce it.

IN EQUITY. Decree dismissing the bill. Complainant appealed. The case is stated in the opinion.

Mr. J. M. Woolworth and *Mr. C. L. Wright*, for appellants, cited: *New Orleans* v. *Clark*, 95 U. S. 644; *Pine Grove* v. *Tascott*, 19 Wall. 666; *Queensbury* v. *Culver*, 19 Wall. 83; *Marsh* v. *Fulton County*, 10 Wall. 676; *Louisiana* v. *Wood*, 102 U. S. 294; *Read* v. *Plattsmouth*, 107 U. S. 568; *Jefferson County* v. *People*, 5 Nebraska, 127; *Clark* v. *Saline County*, 9 Nebraska, 516; *Turner* v. *Woodson County*, 27 Kansas, 314; *Johnson* v. *Stark County*, 24 Illinois, 75; *Quincy* v. *Warfield*, 25 Illinois, 317; *S. C.* 79 Am. Dec. 330; *Briscoe* v. *Allison*, 43 Illinois, 291; *State* v. *Allen*, 43 Illinois, 456; *Allen* v. *Peoria &c. Railroad*, 44 Illinois, 85; *Mix* v. *People*, 72 Illinois, 241; *Stockdale* v. *Wayland*, 47 Michigan, 226; *Ætna Ins. Co.* v. *Lyon County*, 44 Fed. Rep. 329; *Francis* v. *Howard County*, 50 Fed. Rep. 44; *Daviess County* v. *Dickinson*, 117 U. S. 657.

Mr. John M. Thurston, for appellee, cited *Dixon County* v. *Field*, 111 U. S. 83.

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Opinion of the Court.

MR. JUSTICE JACKSON delivered the opinion of the court.

The question presented by the record in this case is whether parties holding the greater part of a series of bonds issued by a county in excess of the limit fixed by the constitution of the State, and which for that reason are not enforceable at law, can invoke the aid of a court of equity to afford them relief by first ascertaining the extent of such excess, or settling the amount of bonds which the county could lawfully have issued, and then proceeding to scale down the issue to the limit thus ascertained, and to declare such excess only to be void, and thereupon decree the residue of such bonds good and valid, and enforce payment of such residue, with interest, against the county; or, in other words, can the holders of bonds issued by a county in excess of its authority, by an offer to surrender and cancel so much of such bonds as may upon inquiry be found to exceed the limit authorized by law, invest a court of equity with jurisdiction, not only to ascertain the amount of such excess, but to declare the residue of such bonds valid and enforce the payment thereof against the county?

The appellants, being the holders of nearly the entire issue of $87,000 in bonds of the county of Dixon, which were by that county issued and donated to the Covington, Columbus and Black Hills Railroad Company, January 1, 1876, filed their bill in May, 1888, in the Circuit Court of the United States for the District of Nebraska, setting forth, among other things, that by a vote of the electors of the county, held on December 27, 1875, the bonds in question were authorized to be issued to the railroad company; that they became the holders thereof, relying upon recitals contained therein, and the certificates endorsed thereon, and believing them to be binding and valid obligations of the county; that, when the interest coupons matured, payment was refused by the county officials, who alleged that the bonds were invalid, because they exceeded in amount ten per cent of the assessed valuation of the property of the county at the time of their issuance. The bill further alleges that complainants had offered to surrender up for cancellation such amounts of the bonds as exceeded ten

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per cent of the assessed valuation of the property of the county, each holder surrendering his proportionate share of such excess; that this offer was refused by the county, which complainants insist cured any infirmity in the bonds, and that the county was equitably bound to recognize as valid the residue thereof, because it and its citizens had received in the construction of the railroad, which the bonds were issued to promote, all the consideration that was intended to be secured thereby. The prayer of the bill was that an account might be taken to ascertain the excess of the issue over ten per cent of the assessed valuation of the property of the county; that such excess might be distributed among the holders of the bonds, or be applied to reduce the amount of each bond ratably, so as to bring the entire issue within the limit authorized by law; that the residue might be declared good and valid, and that the county might be decreed to pay the same, with interest, at the rate of ten per cent from January 1, 1876, to the date of the decree.

The county demurred to the bill, on the ground that the complainants had not, in and by their bill, stated such a case as to entitle them to the relief sought. This demurrer was sustained by the court, and the defects being of such a character that they could not be remedied by amendment, a decree was entered dismissing the bill. 37 Fed. Rep. 304. From that decree the present appeal is prosecuted.

The bonds in question were made payable to the Covington, Columbus and Black Hills Railroad Company, or bearer, and were put in circulation by that company with its indorsement thereon guaranteeing to the holders the payment of the principal and interest of the bonds, according to the tenor thereof, at the place where, and as the same became due and payable. The only consideration received by the county in the transaction was the incidental benefit derived from the construction of the railroad — the proceeds of the bonds, when negotiated, being received directly by the railroad company. The theory of the bill is that the bonds are void only to the extent that they exceed ten per cent of the assessed valuation of the property of the county at the time of their issuance, and upon

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the abatement of that excess the holders are entitled to have the residue thereof — which the county could have lawfully issued — treated as valid, because of the incidental benefits derived from the construction of the road which was sought to be secured by the donation of bonds.

The complainants by their bill, and exhibits thereto, have presented the same state of facts which were considered in *Dixon County* v. *Field*, 111 U. S. 83, where the bonds in question were directly involved, and were held by this court to be void because they exceeded in the aggregate the sum of ten per cent of the assessed valuation of the property of the county at the time of their issue. This decision was based upon section 2, Art. XII. of the constitution of the State of Nebraska, which provides as follows:

"No city, county, town, precinct, municipality, or other subdivision of the State, shall ever make donations to any railroad or other work of internal improvement, unless a proposition so to do shall have been first submitted to the qualified electors thereof, at an election by authority of law: *Provided*, That such donations of a county, with the donations of such subdivisions, in the aggregate, shall not exceed ten per cent of the assessed valuation of such county."

While the complainants concede that the issue of bonds was in excess of what the county was authorized to donate under this provision of the constitution, and for that reason were invalid at law, they insist that a promise to pay so much thereof as could have been lawfully issued should be implied and enforced against the county, under the principle applied in *Louisiana* v. *Wood*, 102 U. S. 294, and in *Read* v. *Plattsmouth*, 107 U. S. 568. Those cases are clearly distinguishable from the present. In *Louisiana* v. *Wood*, by the act of the city, the bonds bore a false date which apparently made them obligatory and binding; they were sold by the city and purchased by the holder in good faith, and the money paid therefor went directly into the city's treasury. This court held that the city was in the market as a borrower and received the money in that character, notwithstanding the transaction assumed the form of a sale of her securities, which being

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defectively executed a suit could not be maintained thereon, and that the holder was entitled to recover the money paid, with interest thereon from the time the obligation of the city to pay was denied.

In *Read* v. *Plattsmouth* the bonds were issued by a city for the purpose of raising money wherewith to construct a high school building within her limits. The bonds were sold and the proceeds applied to that purpose. The legislature subsequently legalized the proceedings of the city in the premises, but this act of the legislature was passed after the constitution of the State went into effect, declaring that the "legislature shall pass no special act conferring corporate powers," and that "no bill shall contain more than one subject, which shall be clearly expressed in its title." A purchaser of the bonds for value without notice of any infirmity in their issue brought suit to recover the amount of the coupons then due and unpaid. It was held that as, by force of the transaction, the city was bound to refund the moneys paid it in consideration of its void bonds, and as the act by confirming them merely recognizes the existence of that obligation and provides a medium for enforcing it according to the original intention of the parties, no new corporate powers were thereby conferred. In this case, as in *Louisiana* v. *Wood*, the city got the full pecuniary consideration for the bonds, and applied the money to the very purpose for which they were issued; and upon well-settled principles, if the securities given for the money so obtained proved invalid or defective for any reason, there was a clear legal, as well as moral, obligation to refund the money which had been so advanced to and received by the city. The circumstances and conditions which gave the holders of the bonds an equitable right in those cases to recover from the municipality the money which the bonds represented, do not exist in the case under consideration, where the county received no part of the proceeds of the bonds, and no direct money benefit, but merely derived an incidental advantage arising from the construction of the railroad, upon which advantage it would be impossible for the court to place a pecuniary estimate, or to say that it would be equal to such

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portion of the bonds in question as the county could lawfully have issued.

Moreover, by the provisions of the constitution of the State of Nebraska, and by the express terms of the proposition submitted to the vote of the people of Dixon County, the bonds in question were issued *as a donation to the railroad company*, and, being intended as a donation, it cannot properly be said that the purchasers of these bonds from the railroad company paid any consideration therefor to the county so as to raise any equity as against it, for the amount represented by the bonds, or any part thereof. Any equitable demand which might under the circumstances have existed against the county, on the theory of consideration received, was in favor of the railroad company which constructed the railroad, and thereby conferred all the incidental benefits which the county derived from the transaction. If any equitable claim arises in favor of the holders of the bonds it must be against the railroad company, from whom the bonds were purchased, and by whom their payment was guaranteed, as that company was the recipient of the legal consideration realized upon the negotiation of the bonds.

Again, the constitution of the State having prescribed the amount which the county might donate to a railroad company, that provision operated as an absolute limitation upon the power of the county to exceed that amount, and it is well settled that no recitals in the bonds, or endorsed thereon, could estop the county from setting up their invalidity, based upon a want of constitutional authority to issue the same. Recitals in bonds issued under legislative authority may estop the municipality from disputing their authority as against a *bona fide* holder for value, but when the municipal bonds are issued in violation of a constitutional provision, no such estoppel can arise by reason of any recitals contained in the bonds. *Lake County* v. *Rollins*, 130 U. S. 662; *Lake County* v. *Graham*, 130 U. S. 674; *Sutliff* v. *Lake County Commissioners*, 147 U. S. 230.

But aside from this view of the subject the bill proceeds upon the false assumption that the bonds in question were partly valid and partly void, and that the case is brought

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within the principle announced in *Daviess County* v. *Dickinson*, 117 U. S. 657. In that case, under authority conferred by statute, the county voted a subscription of $250,000 to a railroad company, which was made, and, by order of the county court, bonds of the county to that amount were ordered to be sold and disposed of by a committee, for the purpose of paying such subscription. The officers of the county, without authority, executed and issued bonds in the amount of $300,000. The bonds, as they were delivered, were separately numbered and entered upon the county register. The court held that the power to issue bonds was limited to $250,000, and that the bonds issued in excess of that amount were unlawful and void. It was further held that bonds to the amount authorized, which were first issued and delivered, were valid and entitled to payment. In that case there was a clear and well-defined line between the legal and illegal issues, which enabled the court to declare invalid such of the bonds as exceeded the amount authorized, and to hold that the illegal excess did not vitiate the bonds which were authorized and legally issued. There was no scaling of the entire issue in that case so as to bring it within the limits of the county's authority. The $250,000, which the court pronounced valid, had been expressly authorized by the county, and the bonds for that amount were readily separated from the $50,000 excess which had not been authorized. It did not, therefore, involve any investigation on the part of the court to ascertain what the county could lawfully issue, but was merely the identification of the bonds which it intended to issue. Again, the amount of the bonds issued was not based upon the assessed valuation of the property of the county, but was limited to the amount which the people of the county, by an election duly held, had determined should be issued. There is a radical difference in these respects between that case and the one under consideration.

What the county authorized and carried into execution in the present case, both by the vote and by the donation, was one entire transaction, and if it should be so reformed as to curtail the entire issue of bonds to such an amount as was within the constitutional limits of the county to donate, it

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would be something different from that which was voted by the county, and carried into effect by the issue of the bonds. This would involve the making of a different donation from what the county voted and intended to make to the railroad company.

It is urged that the vote and the issue of the bonds constituted a contract between the railroad company and the county, and that the bonds issued in pursuance thereof should be scaled, as sought by the bill, to bring the contract within the authority of the county; that as the county intended to make a valid donation, such reduction of the amount of the issue, which the complainants offer to make, should be sanctioned by the court, and the residue declared valid. But the difficulty in the way of this suggestion is that, treating the transaction as a contract, it is not within the power of a court of equity to change its terms and provisions. Besides, it is not shown that the county would have voted a different amount from what was issued, or that it intended to issue a less amount. It is too well settled to need citation of authorities that a court of equity, in the absence of fraud, accident or mistake, cannot change the terms of a contract.

Again, if a right to the equitable relief sought by the complainants could be worked out on the theory of a contract between the county and the railroad company, it would be necessary to establish that such contract actually existed and was valid. In the present case, however, the county had no authority to vote the donation. In *Reineman* v. *Covington, Columbus & Black Hills Railroad*, 7 Nebraska, 310, where an excessive issue of bonds had been voted by the county in aid of internal improvements, it was held by the Supreme Court of Nebraska that the vote was simply a void act, and conferred no authority on the county officials to issue the bonds of the county, either to the amount voted or for any amount. It was urged in that case, as in this, that even if it should be held that the proposition submitted to the electors was in excess of the amount authorized to be voted, still to the extent that the county could have lawfully voted and issued such bonds, they should be treated as constituting a contract between the county

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and the railroad company, and to that extent he upheld. The Supreme Court of the State declined to accede to this view of the subject, and ruled that "the proposition submitted to the electors was an entirety and indivisible. It exceeded the statutory limit, and was therefore wholly unauthorized. The election was simply a void act, conferring no authority whatever upon the county commissioners to issue bonds of the county in any amount whatever."

Several state decisions have been cited in support of the bill. *Johnson* v. *County of Stark*, 24 Illinois, 75; *City of Quincy* v. *Warfield*, 25 Illinois, 317; *Briscoe* v. *Allison*, 43 Illinois, 291; *State* v. *Allen*, 43 Illinois, 456; *Stockdale* v. *Wayland School District*, 47 Michigan, 226. But they mostly relate to taxes imposed beyond authority and stand upon a different doctrine from that involved in the present case. We do not, however, deem it necessary to review them, for if they can be construed to support a bill like the one under consideration, we think they are not founded upon correct principles, and are not in harmony with the decisions of this court.

In *Buchanan* v. *Litchfield*, 102 U. S. 278, bonds were issued by the city of Litchfield under authority of a statute of Illinois and an ordinance of the city, for the construction of a system of water works for the use of the municipality. Neither the statute nor the ordinance contained any reference to the provisions of the constitution prohibiting any county, city, township, or school district from becoming indebted in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per cent of the taxable property therein. The ordinance of the city made no reference to or mention of the indebtedness of the city, although at that time it exceeded the constitutional limit. A *bona fide* holder of the bonds brought suit upon the unpaid coupons thereto attached, and it was held that they were void and could not be recovered. In this case the city was directly benefited by the issue of the bonds, which were negotiated for the sole purpose of erecting a system of public works. The holders of the bonds thereafter sought relief by a bill in equity against the city of Litchfield to enforce the payment

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of the money loaned, or which the city had received upon the issue of the bonds, and used in the construction of its public works. The question of their right to recover on the equitable consideration came before this court in *Litchfield* v. *Ballou*, 114 U. S. 190, and it was held that a provision in a state constitution that a municipal corporation shall not become indebted in any manner, or for any purpose, to an amount exceeding five per cent of its taxable property therein, forbids implied as well as express liability for the amount or amounts received on bonds issued contrary to such provision, and that a court of equity could not afford relief in such a case either on an express or implied obligation; that the transaction being invalid at law, was equally invalid in equity. This conclusion was reached after a full review of the authorities on the question, and the court denied the relief sought.

In *Ætna Life Insurance Co.* v. *Middleport*, 124 U. S. 534, the town of Middleport made an appropriation to a railroad company, to be raised by tax on the property of the town, and bonds of the town for a sum large enough to include interest and discount for which they could be sold and delivered were issued to the railroad company, by whom they were put in circulation. These bonds were declared void, and the insurance company, as a purchaser and holder, for value and without notice, of a portion thereof, sought by a proceeding in equity to be subrogated to the right of the railroad company to enforce payment of the amount of the appropriation voted by the town; but it was held that the purchase of these bonds by the holder was no payment of the appropriation voted by the town, and that the holder was not entitled to claim the benefit of such appropriation; nor that the advantages conferred by the railroad company upon the town inured to the benefit of the holder, or constituted the basis of a consideration on which it could claim to be paid the sum appropriated for the railroad company. The proposition contended for in that case by the complainant was that by its purchase of the bonds, which were supposed to represent the benefit conferred upon the town by the appropriation to the railroad company, it became entitled in equity to claim the payment of the

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amount represented by the bonds on the basis of the original consideration. This contention was not sustained, and the complainant was denied the equitable relief sought.

The principle running through these decisions controls the case under consideration, and clearly establishes that the complainants are not entitled to the relief they seek. The fact that the complainants have no remedy at law, arising from the invalidity of the bonds, confers no jurisdiction upon a court of equity to afford them relief. The established rule, although not of universal application, is that equity follows the law, or, as stated in *Magniac* v. *Thomson*, 15 How. 281, 299, "that wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim *equitas sequitur legem* is strictly applicable."

Where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or, in the absence of fraud, accident, or mistake to so modify it as to make it legal and then enforce it. Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law, and where the transaction, or the contract, is declared void because not in compliance with express statutory or constitutional provision, a court of equity cannot interpose to give validity to such transaction or contract, or any part thereof. These general propositions clearly establish that the present bill cannot be sustained, and our conclusion, therefore, is that there was no error in the judgment of the court below in dismissing the bill, and that judgment is accordingly

Affirmed.

MR. JUSTICE HARLAN dissented from the conclusion in this case.

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Counsel for Appellant.

LANE & BODLEY COMPANY v. LOCKE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

No. 52. Argued October 25, 1893. — Decided November 13, 1893.

In 1871 L. & B., being partners, commenced the manufacture of hydraulic elevators in Cincinnati. S. was employed by them as engineer and draughtsman at a fixed salary of $1200 per annum. While in their employ, and while using their tools and patterns, he invented a stop-valve in 1872, which was patented in February, 1876. In 1876 the partnership was dissolved, and a corporation was formed, called the L. & B. Company, in which the same business was instantly vested in the same interests, and remained there. Meanwhile S. ceased in 1874 to serve L. & B. as engineer and draughtsman, and went into their employ as consulting engineer, at a salary of $2000 per annum. The duties of the latter office did not require him to reside in Cincinnati. He served the partnership in this capacity up to its dissolution, and from that time served the corporation in the same capacity up to 1884. The partnership with his knowledge used his valve in the elevators constructed by them until its dissolution, and after that the corporation used it in the same way and with the like knowledge. In 1884 S. severed his connection with the corporation. During all this time he made no claim for remuneration for the use of his patent, and when asked why he had not, replied that he did not desire to disturb his friendly relations with the L. & B. Company. In 1884 he filed this bill in equity, with the usual prayers for an accounting and for an injunction. *Held*,

(1) That, on authority of *McClurg* v. *Kingsland*, 1 How. 202, it might be presumed that S. had licensed L. & B. and the L. & B. Company to use his invention;

(2) That, on the authority of *Solomons* v. *United States*, 137 U. S. 342, it might be presumed that S. had recognized an obligation, flowing from his employment by the partnership and by the corporation, to permit them to use his invention;

(3) That he was guilty of laches in allowing so long a period to elapse before asserting his rights;

(4) That the excuse he gave for not asserting them was entitled to a less favorable consideration by a court of equity than if his conduct had been that of a mere inaction.

IN EQUITY. The case is stated in the opinion.

Mr. L. M. Hosea for appellant.

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Mr. Thomas A. Logan for appellee.

Mr. Justice Shiras delivered the opinion of the court.

On November 26, 1884, Joseph M. Locke, this defendant in error, filed a bill in the Circuit Court of the United States for the Southern District of Ohio, alleging infringement by the Lane & Bodley Company, a corporation of the State of Ohio, of letters patent No. 173,653, dated February 15, 1876, for an improvement in stop valves, issued to said Locke as inventor. The bill contained the usual allegations, and prayed for an injunction and other relief.

The answer, filed on January 24, 1885, denied that Locke was the original inventor, because the same devices were shown in certain specified earlier patents and publications; denied that said invention was not, for more than two years prior to the application for letters patent therefor, in public use or on sale, but averred, on the contrary, that said apparatus was well known and in public use in the United States for more than two years prior to said application. The answer also contained a history of the original development of the alleged invention by Locke, while in the employment of the firm of Lane & Bodley, and averred a continuous use and sale, by defendant, of the alleged devices, with the knowledge and consent of said Locke, in such circumstances as to show the acquisition by Lane & Bodley of an indefeasible license to use the patented devices. By an amendment to the answer, filed on February 12, 1886, there was set up, as an additional defence, an equitable right in the patent, based upon a written agreement signed by said Locke. The answer also averred that said license and right had become vested in the corporation defendant. The case, having been put at issue, was proceeded in so that the Circuit Court found in favor of the complainant, and, after reference to and report by a master, rendered a final decree against the defendant for the sum of $3667.37, with interest and costs.

The record shows us that the court below held that the patent to Locke had not been anticipated, but was valid in all

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its claims; that the defendant's answer, in respect to its allegations as to Lane & Bodley's right to a license or to an interest in the patent, was not sustained by the evidence; and that, even if Lane & Bodley had such a right, it had not passed to the defendant corporation, under the doctrine of the case of *Hapgood* v. *Hewitt*, 119 U. S. 226.

Although the defendant has assigned error to the holdings of the court below in these several particulars, we are relieved from considering the contentions as to the validity of the patent or its anticipation by other patents, by the election of the counsel for the plaintiff in error to confine his case to the effect of the pleadings and evidence as establishing an equitable right or license in the defendant company to use the patented invention.

If the court below were right in thinking that the case of *Hapgood* v. *Hewitt*, 119 U. S. 226, was applicable, under the facts of the present case, any further inquiry on our part would be unnecessary.

In that case a corporation employed Hewitt as superintendent, who, while in such employ, invented a plough upon which a patent was granted to him. Having acquired a license growing out of the circumstances of the employment, the corporation was afterwards dissolved, and all its assets passed into the hands of a receiver in liquidation. Subsequently, and under the laws of another State, a new corporation was formed, to which the receiver of the old corporation assigned certain assets, among which, as was claimed, was the aforesaid license. This court held that whatever right the employer had to the invention by the terms of Hewitt's contract of employment was a naked license to make and sell the patented improvement as a part of its business, which right, if it existed, was a merely personal one, and not transferable, and was extinguished with the dissolution of the corporation. This ruling was based on two previous decisions: *Troy Iron and Nail Factory* v. *Corning*, 14 How. 193, and *Oliver* v. *Rumford Chemical Works*, 109 U. S. 75. In both these cases there were formal assignments, without having words or clauses in them showing that they were meant to be assignable, and the hold-

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ing of the court was that the contracts themselves were merely personal licenses, and did not import an intent to extend the right to an executor, administrator, or assignee, voluntary or involuntary.

We see no reason to disturb those cases; yet we do not feel compelled to extend their ruling to cover the present case.

It may well be that an express license, set forth in terms, is not assignable unless it is so provided in the instrument. And so there would seem to be no privity, in law or equity, between a defunct corporation of Missouri and a corporation of the State of Illinois. In none of those cases was there evidence showing a recognition, implied or express, by the patentee of any right in the assignee.

In *Hammond* v. *Mason & Hamlin Co.*, 92 U. S. 724, it was held that the non-assignability of a license may be waived if the patentee ratifies the transfer of the license, by otherwise treating the assignee as the licensee was entitled to be treated.

In *Lightner* v. *Boston & Albany Railroad*, 1 Lowell, 338, it was held that a license, though not usually transferable, is transmissible by succession to a corporation formed by the union of two licensees succeeding to the obligations of both, for the reason that the consolidated company is the successor rather than the assignee of the original companies.

In the present case it clearly appears that the company was organized upon the same basis as the firm; that the business of the company was to be the same as that carried on by Lane & Bodley, and to be carried on in the same premises; that the entire property and assets of the firm and its liabilities and obligations were devolved upon the company. Locke himself, in his evidence, repeatedly speaks of the Lane & Bodley Company as the successor to the firm.

And if the defendant's version of the facts is accepted, the acts and circumstances constituting the license and its consideration were begun by the firm of Lane & Bodley, and continued by the corporation, participated in and ratified by Locke himself, to the date of the suit.

Of course, in testing the position of the court below, that, even if the alleged agreement that the firm of Lane & Bodley

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should have an interest in the patent, or the facts out of which a license to use would arise, were proven, the plaintiff would nevertheless have a right to recover against the Lane & Bodley Company, we pronounce a legal conclusion on the facts asserted and put in evidence by the defendant.

If, then, the allegations of the defendant in this case are accepted as true, we do not regard the case of *Hapgood* v. *Hewitt* as an obstacle to the defence asserted.

We do not consider it necessary to enter minutely into the history of the case, nor does our view compel us to ascribe to either of the parties or their witness any intentional departure from the truth. We prefer to put our decision upon facts which, if not conceded, appear to have been clearly established.

The firm of Lane & Bodley were manufacturers of engines and machinery at Cincinnati in 1871. In that year they began to manufacture hydraulic elevators, and on November 21 they employed Joseph M. Locke, as designing engineer and draughtsman, to assist them in the development and construction of elevators and other machinery, at a salary of $1200 per year. He continued in the employment of the firm at Cincinnati until some time in 1874, when he went to Salt Lake City, where he remained, with frequent visits to Cincinnati, until the latter part of 1884. During this period he was more or less continuously in the employ of Lane & Bodley, and of the Lane & Bodley Company, a corporation formed in 1876 to carry on the same business and in the same interests, as consulting engineer, on a salary of $2000 per annum, with a contribution of $20 per month for office rent.

While in the employ of Lane & Bodley, at Cincinnati, Locke made many efforts to devise a stop-valve to be used in the elevators. That he was experimenting in this direction was well known to his employers.

The testimony of Lane and of Locke, while contradictory as to the extent in which Lane contributed to the perfection of the invention, clearly shows that many futile attempts were made in the workshop of Lane & Bodley, involving the use of their tools and patterns, before finally — some time in 1872 — the valve that was subsequently patented was produced, and

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it went immediately into use by Lane & Bodley, and was used by them and the Lane & Bodley Company continuously, with the knowledge of Locke, from that time till the bill was filed in November, 1884.

In February, 1874, Locke left the works of Lane & Bodley, and on May 27, 1874, he made application for the patent. It does not appear that Lane & Bodley knew of this application till the letters patent were granted, February 15, 1876. While Locke was living in Salt Lake City, and in the receipt of a salary from the Lane & Bodley Company — as he himself admits, at least from 1880 to 1884 — he placed an order for the company from the Horn Silver Smelting Company for a hydraulic hoister, containing the stop-valve according to the Locke patent, and he was aware of several instances of elevators sent to that part of the country by the defendant, in which was used the patented valve. On August 30, 1884, Locke wrote a letter to the Lane & Bodley Company, severing his connection with them, and on November 26, 1884, filed his bill.

There was evidence on behalf of the defendant tending to show that an actual agreement had been entered into between Locke and Lane & Bodley, whereby the latter were to have an interest in any and all improvements in the line of their manufacture which might be made by Locke during the period of his employment by the firm, and a right on certain terms to have the exclusive ownership of such patents as should be issued for inventions so made; and the defendant set up such an agreement in an amendment to the answer.

But we agree with the court below in thinking that such agreement was not made out by the evidence; and, indeed, that view of the case has not been pressed in this court. The defence really relied upon is that of a license arising upon implied contract based upon the relation of the parties and the nature of the transactions.

In the case of *McClurg* v. *Kingsland et al.*, 1 How. 202, the facts were very similar to those of the present case. Harley was employed by the defendants at their foundry, receiving wages from them by the week; while so employed,

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he claimed to have invented the improvement patented; after several unsuccessful experiments, he made a successful one in October, 1834; the experiments were made in the defendants' foundry, and at their expense. Harley continued in their employment on wages until February, 1835, during all which time he made rollers for the defendants, using his method; he often spoke of obtaining a patent, and finally, on the 3d of March, obtained a patent. While Harley continued in the defendants' employment, he proposed that they should purchase his right, which they declined; he made no demand on them, and gave them no notice not to use his improvement, till, on some misunderstanding on another subject, he gave them such notice, left their employment, and assigned his patent to the plaintiffs, who brought an action for infringement against the defendants.

The trial judge instructed the jury that if the foregoing facts were found to be true, they would fully justify the presumption of a license, a special privilege, or grant to the defendants to use the invention; that such facts amounted to "a consent and allowance of such use;" and show such a consideration as would support an express license or grant, or call for the presumption of one, to meet the justice of the case, by exempting them from liability; having equal effect with a license, and giving the defendants a right to the continued use of the invention.

These instructions received the approval of this court, and the judgment of the Circuit Court was affirmed.

In *Solomons* v. *United States*, 137 U. S. 342, this subject again came before this court for its consideration, and it was held that "when a person in the employ of another, in a certain line of work, devises an improved method or instrument for doing that work, and uses the property of his employer and the service of other employés to develop and put in practicable form his invention, and explicitly assents to the use by the employer of such invention, a jury, or a court, trying the facts, is warranted in finding that he has so far recognized the obligations of service flowing from his employment and the benefits resulting from his use of the property, as to have

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given to such employer an irrevocable license to use such invention;" and the case of *McClurg* v. *Kingsland* was affirmed and applied.

The facts of the present case fairly bring it within the doctrine of these cases. There is, however, another feature in this case, not present in the cited cases, which is of great significance, and that is, the long period that the plaintiff permitted to elapse before he resorted to his legal remedy. The invention, as we have seen, was perfected in 1872, and was immediately and from that time continuously used by Lane & Bodley and by the Lane & Bodley Company. The suit was brought on November 26, 1884, a period of twelve years. In the interim the plaintiff continued, for most of the time, in the defendants' employment, and admits that he knew that Lane & Bodley and the Lane & Bodley Company were using the patented valve. He does, indeed, claim that in 1875 and 1876 he had conversations with Lane, in which he demanded an arrangement or settlement for the use of his invention, but he admits that, in 1876, Lane repelled him and refused to talk upon the subject. According to Locke's own account, he dropped the matter, and continued to acquiesce in defendants' use of his patent, and to receive a salary from them for a period of several years.

When asked to account for his conduct in this respect, his explanation was that he felt convinced that any demand he might make would have been rejected, and thus his friendly relations with the defendants be disturbed.

On cross-examination the following question was put to him: "Did you in any of your letters to Lane & Bodley refer to the matter of the valve, and ask for any recognition or adjustment of your claim?" To this his answer was: "I did not, for the reason that I had the impression in my mind, from the interview with Colonel Lane at Philadelphia, that Lane & Bodley were not inclined to fulfil promptly the verbal understanding of the preceding year, or, at least, would attempt to open negotiations for more favorable terms, and I did not deem it prudent to open up the matter until I was in a position as for time and means to carry forward claims to

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my right; which conditions I was in hope would occur from time to time, but such conditions, in my judgment, were not realized at an earlier date than 1884."

Again, the following question was put to him by his own counsel: "You have been asked, substantially, why you continued your amicable relations with the company from the West after this evasion of Col. Lane in Philadelphia in 1876. It was also pointed out that you had not mentioned the matter to them from there. Please explain why this was so." His answer was: "I did not regard it as either right or prudent to have other than amicable relations with them so long as they had not actually refused to comply with the agreement of April, 1875. I did not write to them so as to bring up the issue, as I had neither the time nor the means at my command to enforce my rights in case of the refusal to comply with their agreement at that time."

The existence of any agreement in 1875 was strenuously denied by Col. Lane; but, conceding the plaintiff's version of the disputed facts to be true, he yet permitted eight years more to elapse before he made a hostile move. The "amicable relations" he desired to have continued were evidently those out of which he was receiving a salary of $2000 per annum — a sum larger than he would have been entitled to if he had been in receipt of a royalty.

Courts of equity, it has often been said, will not assist one who has slept upon his rights, and shows no excuse for his laches in asserting them. The plaintiff's excuse, in this instance, that he preferred for prudential reasons, to receive a salary from the defendant rather than to demand a royalty, is entitled to a less favorable consideration by a court of equity than if his conduct had been that of mere inaction.

We are, therefore, of opinion that the decree of the court below should be

Reversed, and the record remanded to the Circuit Court, with directions to dismiss the bill of complaint, and it is so ordered.

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MISSISSIPPI MILLS *v.* COHN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA.

No. 27. Argued October 20, 23, 1893. — Decided November 13, 1893.

The jurisdiction of Federal courts, sitting as courts of equity, cannot be enlarged or diminished by state legislation.

Whether such a court has jurisdiction in equity over a particular case, will be determined by inquiring whether by the principles of common law and equity, as distinguished and defined in this country and in the mother country at the time of the adoption of the Constitution of the United States, the relief sought in the bill was one obtainable in a court of law, or one which only a court of equity was fully competent to give.

A creditors' bill, to subject property of the debtor fraudulently standing in the name of a third party to the payment of judgments against the debtor, is within the jurisdiction of a Federal court, sitting as a court of equity, although, in the courts of the State in which the Federal court sits, state legislation may have given the creditor a remedy at law.

N. and S., being citizens of Louisiana, obtained a judgment in a court of the State against C., also a citizen of Louisiana, which they assigned to W. and L., citizens of Missouri. The assignees thereupon brought suit against C. in the Circuit Court of the United States for the Western District of Louisiana, putting the jurisdiction on the ground of diverse citizenship. *Held*, that under the provisions of § 1 of the act of March 3, 1875, 18 Stat. 470, c. 137, which statute was in force when the suit was commenced, it could not be maintained.

The jurisdiction of this court in this case is limited by the act of February 25, 1889, 25 Stat. 693, c. 236, to the determination of the questions as to the jurisdiction of the Circuit Court.

THE facts in this case are as follows: On March 29, 1881, Joel Wood and William H. Lee, citizens of the State of Missouri, partners as Wood & Lee, obtained a judgment in the Eighth District Court of the parish of East Carroll, Louisiana, against Simon Cohn, a citizen of the State of Louisiana, for $539.25, with interest, for goods sold by them to him on October 30, 1880. On April 2, 1881, S. B. Newman and S. D. Stockman, composing the firm of S. B. Newman & Co., also obtained a judgment in the same court against said Cohn for

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$24,282.16, which judgment, subject to a credit of $5452, the proceeds of certain attachment proceedings accompanying the action, was duly assigned to Wood & Lee. Newman and Stockman were both citizens of Louisiana. On November 30, 1885, Wood & Lee filed their bill in equity in the Circuit Court of the United States for the Western District of Louisiana against Simon Cohn, his wife Fannie Cohn, and his wife's mother, Henrietta Steinhardt, all citizens of Louisiana, the purpose and object of which was to set aside as fraudulent a judgment in favor of Mrs. Cohn against Simon Cohn, and to subject certain property standing in the name of Mrs. Steinhardt, and alleged to be the property in fact of Simon Cohn, to the payment of these judgments. On July 11, 1882, the Mississippi Mills, a corporation organized under the laws of the State of Mississippi, obtained a judgment in the Eighth District Court of the parish of East Carroll, Louisiana, against Simon Cohn, for $751.46. On July 5, 1883, it commenced in that court a suit of substantially the same nature as that commenced by Wood & Lee; this suit was duly removed to the Circuit Court of the United States for the Western District of Louisiana. After such removal, and on October 29, 1886, these cases were consolidated by an order of the Circuit Court, and from that time on they proceeded as one case. Pleadings having been perfected and proofs taken, the consolidated case was submitted to the Circuit Court, and on July 18, 1889, a decree was entered dismissing the bills of plaintiffs for want of jurisdiction. To reverse this decree of dismissal, appellants have brought their appeal to this court.

Mr. Edward Cunningham, Jr., for appellants.

No appearance for appellees.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

No appearance has been made for the appellees in this court, and we should be at a loss to know the grounds for the decision

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of the Circuit Court were it not for the opinion of District Judge Boarman, before whom the case was heard, 39 Fed. Rep. 865, which gives his reasons for entering the decree of dismissal.

It may be premised that no objection arises on account of the amount in controversy in either suit, for at the time these suits were brought the Circuit Court had jurisdiction where such amount exceeded the sum of five hundred dollars. Rev. Stat. § 629. Nor can there be any doubt of the jurisdiction of this court over the appeals of either appellant, treating them as separately appealing, because the case in the trial court involved the question of the jurisdiction of that court. 25 Stat. 693, act of February 25, 1889, c. 236. The decision of the Circuit Court was to the effect that no relief could be had in equity, because under the practice prescribed in that State there was a remedy by an action at law. We quote from the opinion:

"If it be true that Cohn, notwithstanding said purchases, transfers, etc., were ostensibly made by Mrs. Steinhardt, and the title of record is in her name, is the real owner of the property now sought to be subjected to the payment of Cohn's debts, the complainants have a well-known and adequate remedy at law to make the property liable for their claims.

"The issues made up by the pleadings and evidence involve fundamentally the title to, or the real ownership of, the property in question. The complainants charge that Cohn, in fact and law, is the owner thereof. The defendants deny his ownership, and contend that the sales were real sales to Mrs. Steinhardt. Such issues are not determinable in this court in equity proceedings. . . . In the view and purpose of complainants' charges, Cohn now owns the property, and they have not presented or sought to present such an action as should be heard in equity, and it is ordered that their suit be dismissed."

We are unable to concur in these views. It is well settled that the jurisdiction of the Federal courts, sitting as courts of equity, is neither enlarged nor diminished by state legislation. Though by it all differences in forms of action be abolished;

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though all remedies be administered in a single action at law; and, so far at least as form is concerned, all distinction between equity and law be ended, yet the jurisdiction of the Federal court, sitting as a court of equity, remains unchanged. Thus, in *Payne* v. *Hook*, 7 Wall. 425, 430, it was said, citing several cases: "We have repeatedly held 'that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.' If legal remedies are sometimes modified to suit the changes in the laws of the States, and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation or restraint by state legislation, and is uniform throughout the different States of the Union." And in *McConihay* v. *Wright*, 121 U. S. 201, 205: "The contention of the appellants, however, is that by the statute of West Virginia the complainant might have maintained an action of ejectment. Reference is made, in support of this contention, to the West Virginia Code of 1868, c. 90, to show that an action of ejectment in that State will lie against one claiming title to or interest in land, though not in possession. Admitting this to be so, it, nevertheless, cannot have the effect to oust the jurisdiction in equity of the courts of the United States as previously established. That jurisdiction, as has often been decided, is vested as a part of the judicial power of the United States in its courts by the Constitution and acts of Congress in execution thereof. Without the assent of Congress that jurisdiction cannot be impaired or diminished by the statutes of the several States regulating the practice of their own courts." See also *Scott* v. *Neely*, 140 U. S. 106; *Cates* v. *Allen*, 149 U. S. 451, in which a state statute, extending the jurisdiction of equity to matters of a strictly legal nature, was held inapplicable to the Federal courts, and unavailing to vest a like jurisdiction in such courts, sitting as courts of equity.

So, conceding it to be true, as stated by the learned judge,

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that the full relief sought in this suit could be obtained in the state courts in an action at law, it does not follow that the Federal court, sitting as a court of equity, is without jurisdiction. The inquiry rather is, whether by the principles of common law and equity, as distinguished and defined in this and the mother country at the time of the adoption of the Constitution of the United States, the relief here sought was one obtainable in a court of law, or one which only a court of equity was fully competent to give.

In order to determine this question, a further statement is necessary of the facts disclosed in and the exact relief sought by these bills. After the allegations in respect to the judgments, the bills aver that in 1879 and 1880 the defendants entered into a conspiracy to defraud and despoil the creditors of Simon Cohn; that he proceeded to carry out this scheme by purchasing from plaintiffs and others a large amount of goods, on credit, and selling them for cash at a great sacrifice, and these moneys he had so placed as to be beyond the reach of his creditors. The means by which these goods were received and disposed of are stated at some length. Further, and, as is alleged, in carrying out this scheme, he fraudulently procured his wife to institute a suit for moneys, when none was due from him to her, and he not defending, to recover a judgment for $4000 as her separate estate, by which any property in his name could be sold and the title transferred to his wife. Also, he executed a mortgage for $5800 on certain real estate, to wit, six lots in the town of Providence and a fine brick storehouse thereon, in favor of his brother, a mortgage which was in fact without any consideration. Thereafter, his brother foreclosed such mortgage, and on foreclosure the property was purchased in the name of Mrs. Steinhardt, Simon Cohn's mother-in-law. Other property described was purchased in the name of Mrs. Steinhardt, although the money paid therefor was furnished by Cohn, and was part of that realized from the cash sales heretofore mentioned. All his property had in fact been placed in the name of Mrs. Steinhardt, and he was carrying on business ostensibly in her name, though all the while the real owner. The prayer of the bills is, that

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the judgment in favor of the wife be set aside as fraudulent; that the defendant, Simon Cohn, be declared the real owner of the properties described; and that they be taken possession of by a receiver, and sold to satisfy the judgments.

It will be seen from this statement that these bills were substantially creditors' bills, to subject property — in fact, the property of the defendant, but fraudulently standing in the name of a third party — to the payment of those judgments, and to remove a fraudulent judgment which might stand as a cloud upon the title of the debtor. Such suits have always been recognized as within the jurisdiction of equity. In 2 Beach on Modern Equity Jurisprudence, § 883, it is said: "A court of equity will aid a judgment creditor to reach the property of his debtor by removing fraudulent judgments or conveyances or transfers which defeat his legal remedy at law." See also 3 Pomeroy's Eq. Juris., § 1415; *Dockray* v. *Mason*, 48 Maine, 178; *Edgell* v. *Haywood*, 3 Atk. 352, 357; *Burroughs* v. *Elton*, 11 Ves. 29, 33; *Hendricks* v. *Robinson*, 2 Johns. Ch. 283; *Edmeston* v. *Lyde*, 1 Paige, 637; *Beck* v. *Burdett*, 1 Paige, 305; *Cuyler* v. *Moreland*, 6 Paige, 273; *Feldenheimer* v. *Tressel*, 6 Dakota, 265. It follows from these considerations that the Circuit Court erred in dismissing these bills for want of jurisdiction.

It was further held by the Circuit Court, as appears from the opinion referred to, that Wood and Lee were not entitled to relief by reason of the Newman judgment, on the further ground that Newman and Stockman, being citizens of Louisiana, could not have sued in the Federal court; and that Wood and Lee, their assignees, were equally disabled. This, by reason of that clause in the first section of the act of March 3, 1875, 18 Stat. 470, c. 137, conferring jurisdiction on the Circuit Courts, (which statute was in force at the time of the commencement of this suit,) which reads as follows: "Nor shall any Circuit or District court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange."

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This question has been settled adversely to the appellants, and in accord with the ruling of the Circuit Court, by the case of *Walker* v. *Powers*, 104 U. S. 245, 248. That case arose under the same section. That presented as this, a suit by the assignee of a judgment to set aside, as fraudulent, certain sales and conveyances of real estate made by the judgment debtor, and to subject it to the payment of the judgment. There were two judgments, and after disposing of one Mr. Justice Miller, speaking for the court, said, as to the other: "In reference to the judgment in favor of Chester, on which, as his assignee, Whittemore asks relief, it is urged as ground of demurrer, that Chester being a citizen of the same State with Stewart, his assignee is incapable of prosecuting this suit in a Federal court. It was brought in 1876, and the question here raised must be decided by a construction of the act of March 3, 1875, c. 137, 18 Stat. 470. . . . That judgment is, then, the foundation of his suit in the Circuit Court. It is a cause of action which he holds by assignment from a party who cannot sue in that court. Without this cause of action he has no standing in court, and has no right to ask the court to inquire into the other matters alleged in the bill. It is as much the foundation of his right to bring the present suit as if it were a bond and mortgage on which he was asking a decree of foreclosure. See *Sheldon* v. *Sill*, 8 How. 441. . . . The Circuit Court, if the judgment of Chester had been there recovered, might have jurisdiction of the case to remove obstructions to the enforcement of its own judgment, no matter who for the time being was its owner. But where a party comes for the first time in a court of the United States to obtain its aid in enforcing the judgment of a state court, he must have a case on which the former court can entertain original jurisdiction. *Christmas* v. *Russell*, 5 Wall. 290."

It may be that, when the appellants obtain the relief they seek in respect to the judgments rendered in their own favor in the Federal court, and the property of the defendants has been sold by a receiver or otherwise, the owners of this Newman judgment may intervene in the case and apply for a share of the funds. *Payne* v. *Hook*, 7 Wall. 425, 432. But

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that is a question which need not now be considered, and is very different from the question here presented, of the right of the assignees of this state judgment to maintain in the Federal courts an independent suit for its enforcement.

The act of February 25, 1889, which gives this court jurisdiction, 25 Stat. 693, c. 236, provides that "in cases where the decree or judgment does not exceed the sum of five thousand dollars, the Supreme Court shall not review any question raised upon the record, except such question of jurisdiction." It follows, therefore, that in this case our inquiry must stop with that question of jurisdiction, which we have thus determined.

The decree of the Circuit Court dismissing these bills for want of jurisdiction must be reversed, and the consolidated case will be remanded to that court for further proceedings in accordance with law.

McDAID v. OKLAHOMA TERRITORY, ex rel. SMITH.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 785. Submitted October 20, 1893. — Decided November 20, 1893.

Under the authority conferred upon the Secretary of the Treasury by the act of May 14, 1890, 26 Stat. 109, c. 207, entitled "an act to provide for town site entries of lands in what is known as 'Oklahoma,' and for other purposes," it was entirely competent for the Secretary to provide for an appeal to the Commissioner of the General Land Office in case of contest.

When an appeal from a decision of the trustees appointed by the Secretary under the provisions of that act was duly taken, it became the duty of the trustees to decline to issue a deed to the appellee until the appeal was disposed of.

THIS was a proceeding in mandamus brought in the District Court of the First Judicial District of Logan County, in the Territory of Oklahoma, April 27, 1891, to compel Daniel J.

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Statement of the Case.

McDaid, William H. Merriweather, and John H. Shanklin, as trustees of the town site of Guthrie, Oklahoma Territory, appointed by the Secretary of the Interior under the act of May 14, 1890, 26 Stat. 109, c. 207, entitled "An act to provide for town site entries of lands in what is known as 'Oklahoma,' and for other purposes," to execute deeds for certain lots in said town site. The relators, Smith and Bradley, claimed to have entered two lots on the site, and one John Galloway claimed a prior right thereto.

On September 23, 1890, the relators applied to the town site trustees for a deed to the lots, and on the same day Galloway also made his application therefor. The trustees heard the controversy of the two claimants, and on April 6, 1891, rendered their decision in favor of the relators, finding that they were entitled to the lots in dispute and to a conveyance from the trustees, and they ordered that a deed be executed accordingly. Galloway having died, his heirs were substituted for him, and they filed their appeal from the decision to the Commissioner of the General Land Office. In consequence of the appeal the trustees refused to issue the deed, and thereupon the relators instituted this suit.

The complaint alleged that the sole ground of refusal was the appeal; that there was no authority for such appeal, and that it furnished no excuse to the trustees for their refusal. The defendants answered, setting up that Galloway's heirs "duly filed their appeal from the decision of this board to the Commissioner of the General Land Office pursuant to the instructions under the act of Congress under which this board was appointed, such instructions having been made by the Secretary of the Interior authorizing appeals by claimants to lots in cases where such claimants feel themselves aggrieved by the decisions of this board.

"And these defendants, further answering, say that there is a right of appeal given by the instructions of the Secretary of the Interior and recognized by this board, and that appeals in similar cases have been taken by other persons from other decisions of this board both before and after the appeal taken in this case.

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Statement of the Case.

"And these defendants say that they were appointed by the Secretary of the Interior, and that at the time of their appointment were directed to allow appeals from their decisions where such appeals were properly prayed, and that the appeal in this case was properly prayed, and under such instructions was granted.

"And these defendants further say that the question of legal ownership as to said lot has not been definitely settled by the higher tribunals of the Interior Department, and that no deeds have passed for such lots and should not pass until such appeal is disposed of, and that under such circumstances it is not for this court by mandate or otherwise to direct in what manner or to whom conveyances of lands or lots, the title to which is in the United States, should be made to individuals."

Relators demurred to the answer and their demurrer was sustained. Defendants then moved to dismiss the cause upon the ground that the territorial court had no jurisdiction over the subject-matter. This motion was overruled, and thereupon judgment was entered ordering the trustees to execute and deliver a deed to the relators of the lots in question. An appeal was thereupon prosecuted to the Supreme Court of the Territory, by which the judgment was affirmed, July 6, 1892. The opinion of the court and of Clark, J., dissenting, will be found in 1 Oklahoma, 92. The cause was then brought to this court by writ of error.

The act of Congress of May 14, 1890, omitting the eighth section, is as follows:

"*Be it enacted, etc.*, That so much of the public lands situate in the Territory of Oklahoma, now open to settlement, as may be necessary to embrace all the legal subdivisions covered by actual occupancy for purposes of trade and business, not exceeding twelve hundred and eighty acres in each case, may be entered as town sites, for the several use and benefit of the occupants thereof, by three trustees to be appointed by the Secretary of the Interior for that purpose, such entry to be made under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes as near as may be;

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and when such entry shall have been made, the Secretary of the Interior shall provide regulations for the proper execution of the trust, by such trustees, including the survey of the land into streets, alleys, squares, blocks, and lots when necessary, or the approval of such survey as may already have been made by the inhabitants thereof, the assessment upon the lots of such sum as may be necessary to pay for the lands embraced in such town site, costs of survey, conveyance of lots, and other necessary expenses, including compensation of trustees: *Provided*, That the Secretary of the Interior may when practicable cause more than one town site to be entered and the trust thereby created executed in the manner herein provided by a single board of trustees, but not more than seven boards of trustees in all shall be appointed for said Territory, and no more than two members of any of said boards shall be appointed from one political party.

"SEC. 2. That in the execution of such trust, and for the purpose of the conveyance of title by said trustees, any certificate or other paper evidence of claim duly issued by the authority recognized for such purpose by the people residing upon any town site, the subject of entry hereunder, shall be taken as evidence of the occupancy by the holder thereof of the lot or lots therein described, except that where there is an adverse claim to said property such certificate shall only be *prima facie* evidence of the claim of occupancy of the holder: *Provided*, That nothing in this act contained shall be so construed as to make valid any claim now invalid of those who entered upon and occupied said lands in violation of the laws of the United States or the proclamation of the President thereunder: *Provided further*, That the certificates hereinbefore mentioned shall not be taken as evidence in favor of any person claiming lots who entered upon said lots in violation of law or the proclamation of the President thereunder.

"SEC. 3. That lots of land occupied by any religious organization, incorporated or otherwise, conforming to the approved survey within the limits of such town site, shall be conveyed to or in trust for the same.

"SEC. 4. That all lots not disposed of as hereinbefore pro-

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vided for shall be sold, under the direction of the Secretary of the Interior, for the benefit of the municipal government of any such town, or the same or any part thereof may be reserved for public use as sites for public buildings, or for the purpose of parks, if in the judgment of the Secretary such reservation would be for the public interest, and the Secretary shall execute proper conveyances to carry out the provisions of this section.

"SEC. 5. That the provisions of sections four, five, six, and seven of an act of the legislature of the State [of] Kansas, entitled 'An act relating to town sites,' approved March second, eighteen hundred and sixty-eight, shall, so far as applicable, govern the trustees in the performance of their duties hereunder.

"SEC. 6. That all entries of town sites now pending on application hereafter made under this act, shall have preference at the local land office of the ordinary business of the office and shall be determined as speedily as possible, and if an appeal shall be taken from the decision of the local office in any such case to the Commissioner of the General Land Office, the same shall be made special, and disposed of by him as expeditiously as the duties of his office will permit, and so if an appeal should be taken to the Secretary of the Interior. And all applications heretofore filed in the proper land office shall have the same force and effect as if made under the provisions of this act, and upon the application of the trustees herein provided for, such entries shall be prosecuted to final issue in the names of such trustees, without other formality, and when final entry is made, the title of the United States to the land covered by such entry shall be conveyed to said trustees for the uses and purposes herein provided.

"SEC. 7. That the trustees appointed under this act shall have the power to administer oaths, to hear and determine all controversies arising in the execution of this act, shall keep a record of their proceedings, which shall, with all papers filed with them and all evidence of their official acts, except conveyances, be filed in the General Land Office and become part of the records of the same, and all conveyances executed by

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them shall be acknowledged before an officer duly authorized for that purpose. They shall be allowed such compensation as the Secretary of the Interior may prescribe, not exceeding ten dollars per day while actually employed; and such travelling and other necessary expenses as the Secretary may authorize, and the Secretary of the Interior shall also provide them with necessary clerical force by detail or otherwise."

Section 2387 of the Revised Statutes reads thus:

"Whenever any portion of the public lands have been or may be settled upon and occupied as a town site, not subject to entry under the agricultural preëmption laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated."

Sections four, five, six, and seven of the act of the legislature of the State of Kansas, entitled "An act relating to town sites," approved March 2, 1868, are as follows:

"SEC. 4. At any time after the entry of any such town site, the probate judge of the county in which such town may be situated may appoint three commissioners, who shall not be residents of such town, or the owners of any interest therein; and it shall be the duty of such commissioners to cause an actual survey of such site to be made, conforming, as near as may be, to the original survey of such town, designating, on such plat, the lots or squares on which improvements are standing, with the name of the owner or owners thereof, together with the value of the same.

"SEC. 5. Said commissioners shall, as soon as the survey and plat shall be completed, cause to be published, in some newspaper published in the county in which such town is situated,

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a notice that such survey has been completed, and giving notice to all persons concerned or interested in such town site that, on a designated day, the said commissioners will proceed to set off to the persons entitled to the same, according to their respective interests, the lots, squares, or grounds to which each of the occupants thereof shall be entitled. Such publication shall be made at least thirty days prior to the day set apart by such commissioners to make such division.

"SEC. 6. After such publication shall have been duly made, the commissioners shall proceed, on the day designated in such publication, to set apart to the persons entitled to receive the same, the lots, squares, or grounds to which each shall be entitled, according to their respective interests, including, in the portion or portions set apart to each person or company of persons, the improvements belonging to such persons or company.

"SEC. 7. After the setting apart of such lots or grounds and the valuation of the same, as hereinbefore provided for, the said commissioners shall proceed to levy a tax on the lots and improvements thereon, according to their value, sufficient to raise a fund to reimburse to the parties who may have entered such site, the sum or sums paid by them in securing the title to such site, together with all the expenses accruing in perfecting the same, the fees due the commissioners and the surveyor for their respective services, and other necessary expenses connected with the proceedings." Kansas Gen. Stats. 1868, pp. 1074, 1075.

Mr. Solicitor General for plaintiffs in error.

No appearance for defendants in error.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

In *Knight* v. *United States Land Association*, 142 U. S. 161, the supervisory power of the Secretary of the Interior over all matters relating to the sale and disposition of the public lands, the surveying of private land claims and the issuing of

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patents thereon, and the administration of the trusts devolving upon the government by reason of the laws of Congress or under treaty stipulations, respecting the public domain, was fully considered, and numerous authorities cited. It was declared by Mr. Justice Lamar, speaking for the court, that the Secretary was clothed with plenary authority as the supervising agent of the government to do justice to all claimants, and to preserve the rights of the people of the United States, and that he could exercise such supervision by direct orders or by review on appeal, and, in the absence of statutory direction, prescribe the mode in which it could be exercised by such rules and regulations as he might adopt.

In the execution of the trusts created by the act of May 14, 1890, the Secretary of the Interior on June 18, 1890, issued a circular setting forth such regulations. (10 Land Dec. 666.) Of these, paragraph 12 provided for the hearing and determination by the town site trustees of controversies between two or more claimants to the same lot, block, or parcel of land, and paragraph 13 for an appeal from their judgment to the Commissioner of the General Land Office, and an appeal from the Commissioner to the Secretary. On May 8, 1891, this paragraph was amended by adding thereto the words: "A failure to appeal as herein provided shall not be construed as a waiver of, or to prejudice the rights of either party, nor held to preclude suits in the courts in case the party entitled to appeal desires to proceed in that manner for the purpose of settling the title to the lot or lots in controversy." (12 Land Dec. 612.) These regulations were referred to by the Secretary under date of July 3, 1891, in certain instructions to the Commissioner of the General Land Office, in which it was ruled that the Secretary was authorized to allow appeals from the decisions of the town site trustees under the act of May 14, 1890, to the Commissioner, even though the act did not expressly provide for an appeal in such cases. (13 Land Dec. 9.) The question of the right of appeal is there discussed at length, and again on March 15, 1892, (14 Land Dec. 295,) by the Assistant Secretary, who decided that the issue of the patent to town site trustees under the act was not a disposition

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of the government title, but a conveyance in trust to be held under the direction of the Secretary of the Interior.

This proposition is denied, and it is insisted that the authority of the Secretary relates solely to public lands, the title to which is still in the United States, and that by the issue of the patent to town site trustees the title passes and all control over the lands embraced therein is lost. Hence that in this case the title of the United States passed by the patent to the trustees, and that they held it thereafter in trust for the occupants, free from the control of the Land Department. Reference is made to *Moore* v. *Robbins*, 96 U. S. 530, and like cases, to the point that when a patent has been awarded, issued, delivered, and accepted, all right to control the title or to decide on the right to the title has passed from the executive department of the government. But those cases refer to the legal title directly and finally conferred, and the principle invoked can only be applicable on the assumption that by the town site conveyance title was granted to the Oklahoma trustees for the purpose of divesting the government of all authority and control over the final disposition of the property, and not for the purpose of putting title in the trustees as agents of the government for the execution of the trust devolving upon them as such. Whether this assumption is justified or not must depend upon the terms and true construction of the act of May 14, 1890.

By section one of that act the land that might be embraced in each town site entry was limited, and it was prescribed that the entry should be made for the several use of the occupants thereof by three trustees to be appointed by the Secretary of the Interior for that purpose, and that when the entry should have been made the Secretary should provide regulations for the proper execution of the trust by such trustees, including surveys when necessary, or the approval of such survey as might already have been made by the inhabitants, and for the assessment upon the lots of such sum as might be necessary to pay for the lands embraced in such town site, costs of survey, conveyance of lots, and other necessary expenses, including compensation of trustees.

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Section two provided that in the execution of such trust and for the purpose of the conveyance of title by the trustees, any certificate or other paper evidence of writing duly issued by the authority recognized for such purpose by the people residing upon any town site, the subject of entry thereunder, should be taken as evidence of the occupancy by the holder thereof of the lot or lots therein described, except that where there might be an adverse claim to such property such certificate should only be *prima facie* evidence of the claim of occupancy.

Section four directed that all lots not disposed of as thereinbefore provided for should be sold under the direction of the Secretary of the Interior for the benefit of the municipal government of any such town, or the same or any part thereof might be reserved for public use as sites of public buildings or for the purpose of parks, if in the judgment of the Secretary such reservation should be in the public interest, and the Secretary was required to execute proper conveyances to carry out the provisions of this section.

Section six prescribed the manner of the adjudication of the entries, and directed "that when final entry is made the title of the United States to the land covered by such entry shall be conveyed to said trustees for the uses and purposes herein provided."

By section seven power was given to the trustees to administer oaths and to hear and determine all controversies arising in the execution of the act, and they were directed to keep a record of their proceedings, which should, with all papers filed with them and all evidence of their official acts, except conveyances, be filed in the General Land Office and become part of the records of the same; and the trustees were to be allowed such compensation within a specified limit as the Secretary of the Interior might prescribe, and such travelling and other necessary expenses as he might authorize, and he was also to provide them with the necessary clerical force by detail or otherwise.

In the light of these provisions we perceive no reason for doubting that the trustees appointed by the Secretary under the act, and whose compensation and expenses were fixed by

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him, were agents of the government for the purpose of carrying out the trust thereby created to the extent and as specified, and this included the ascertainment of the beneficiaries in the first instance and the transfer of the title to them. While on the final entry the title of the United States was to be conveyed to the trustees, such conveyance was explicitly declared as made "for the uses and purposes in the act provided," and among these uses and purposes was the determination of controversies between contesting claimants by the trustees, who were to administer oaths, pass on evidence, and keep a record of their proceedings, to be deposited in the Land Department. They unquestionably acted in that regard as the representatives of the government, and their decisions were properly subject to that appeal to the Commissioner and the Secretary for which the Secretary's regulations provided. As matter of convenience, the trustees were the instrumentality for the transmission of title in respect of lands disposed of to actual holders, while the Secretary, notwithstanding the patent, was the medium as to surplus lands, which he could not be if the legal title had definitively passed to the trustees by the patent for the whole site. The result is the same if the fourth section be construed as directing the Secretary to cause the trustees to execute the conveyances therein referred to. The trust upon which the title was held was to be discharged in accordance with the regulations, and was necessarily subject to the supervisory power of the Department of the Interior.

Section 2387 of the Revised Statutes confirms this view, for the town sites there referred to were to be entered by the corporate authorities of the town, if incorporated, or, if not, by the judge of the county court for the county in which the town was located, and the trust as to the disposal of the lots and the proceeds of the sales thereof was to be executed in accordance with such regulations as might be prescribed by the legislative authority of the State or Territory in which the town might be situated, while under this special act, in reference to Oklahoma, the entry was to be made by trustees appointed by the Secretary and the trust conducted under such regulations as might be established by him. In the one case

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the government parted with its connection with the land when the patent issued to the local authority; in the other, the government retains its connection by having the entry made by its own agents, and the trust executed in the manner it directs.

By the scheme of this act, the title is held in trust for the occupying claimants, it is true, but also in trust *sub modo* for the government until the rightful claimants and the undisposed of or surplus lands are ascertained. The act did not contemplate that the allowance of the entry and the issue of the patent should operate to devolve the final determination of conflicting claims to lots upon these government appointees, and, until the trustees conveyed, the title did not pass beyond the control of the executive department in that regard.

The regulation of the execution of the trust by the Secretary covered the regulation of the matter of controversies between claimants, and also included, in addition and not by way of limitation, the regulation of the survey of the land into blocks, streets, alleys, and lots, and the assessment for purchase money, costs, compensation, and expenses. The supervisory power could no more be denied in respect of the decisions of the trustees upon adverse claims than in respect of the survey and assessment.

In our judgment, it was entirely within the competency of the Secretary to provide for an appeal in cases of contest, and, as he had done so by the regulations in question, and an appeal had been duly taken thereunder in the case before us, the trustees properly declined to issue the deed, and the mandamus was improvidently awarded, even assuming that the District Court has jurisdiction in the premises and that mandamus was the appropriate remedy.

The judgment is reversed and the cause remanded to the Supreme Court of the Territory of Oklahoma, with a direction to reverse the judgment of the District Court and remand the case to that court with directions to dismiss the petition.

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KNAPP v. MORSS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

UFFORD v. MORSS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Nos. 55, 310. Argued October 26, 1893. — Decided November 20, 1893.

The second claim in letters patent No. 233,240, for improvements in dress forms, issued October 12, 1880, to John Hall, and by him assigned to Charles A. Morss, viz.: "2. In combination with the standard a and ribs c, the double braces e^2, the sliding blocks f^1 and f^2, and rests h^1 and h^2, substantially as and for the purposes set forth," when read and interpreted with reference to other and broader claims which were made by the patentee and were rejected by the Patent Office, must either be held to be invalid for want of invention, or must be so limited in view of that action by the Patent Office, and in view of the prior state of the art, as not to be infringed by a combination leaving out one of the elements of the patentee's device.

A claim in letters patent cannot be so construed as to cover what was rejected by the Patent Office on the application for the patent.

The combination of old elements which perform no new function, and accomplish no new results, does not involve patentable novelty.

The end or purpose sought to be accomplished by a device is not the subject of a patent, but only the new and useful means for obtaining that end.

In equity to restrain the infringement of letters patent. The case is stated in the opinion.

Mr. John Kimberly Beach for appellants.

Mr. Payson E. Tucker and *Mr. Charles F. Perkins* for appellee.

Mr. Justice Jackson delivered the opinion of the court.

These two causes, which were heard at the same time, are substantially alike in every particular affecting their proper

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determination, and will, therefore, be considered together, although they come from different jurisdictions. They are suits for the infringement of letters patent No. 233,240, for improvements in dress forms, issued October 12, 1880, to John Hall, and by him assigned to Charles A. Morss, the appellee. In one cause the appellants, William H. Knapp and Charles L. Knapp, are the manufacturers of the articles alleged to infringe, while the appellants in the other cause, Samuel N. Ufford & Son, are merely the selling agents of the manufactured articles. In both cases it was decreed below that the second claim (the only one in controversy) of the patent was infringed. From these decrees the present appeals are prosecuted.

The invention relates to improvements in dress forms, by means of which every part of the device is rendered adjustable, so that it may be applied to a dress of any size or style and fill it out perfectly in order that trimming may be placed upon it. The device described in the patent by which this result is to be accomplished consists of upright ribs of thin, springy material assembled around a central standard, which supports the whole structure. The ribs are connected near their top and bottom extremities to braces or stretchers, which extend obliquely from the ribs to the standard, and are there concentrated and hinged on small movable collars which encircle the standard. There is a single set of braces at the bottom, while at the top there is a double set. This double brace consists of a series of arms or stretchers, part of which radiate from the upper movable collar obliquely downward to the ribs, to which they are fastened at a point near where the other part of the arms or stretchers are fastened. The lower series of stretchers extend obliquely downward from the point on the ribs where they are fastened to a collar separate from and independent of the upper collar. Following each collar, which is loose, is a rest which may be secured to the standard at any point desired by a set screw, thus enabling the whole structure to be adjusted and revolve upon the standard.

The second claim of the patent reads as follows: "2. In combination with the standard *a* and ribs *c*, the double braces

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e^2, the sliding blocks f' and f^2, and rests h' and h^2 substantially as and for the purposes set forth."

The defences set up by the answer were invalidity in the patent and non-infringement, and in support of the former defence the following patents were relied on: To C. W. Wilson, May 3, 1870, No. 102,638; to F. A. Balch, September 17, 1867, No. 68,831; to S. B. Ferris, August 27, 1878, No. 207,351; to C. Franke, September 7, 1875, No. 167,394.

The theory of the invention is that as the collar at the bottom of the standard is raised the braces will force the ribs to expand to the circumference limited by the tape or elastic affixed to the lower extremities of the ribs. Should the collar be pushed above the mean centre of expansion, which is attained when the braces are at right angles with the standard, the tendency to expand would cease and contraction would begin. But the proper degree of expansion produced by the lower braces is never exceeded in expanding the dress form. At that point the skirt hangs loosely on the form, and the resistance is so slight that this brace is of but little use. However, the lower brace is not one of the elements of the combination of the second claim. But at the upper part of the form, where expansion and opposition to contraction are alike desired, the mechanical difficulty resulting from pushing the single brace beyond the mean centre of expansion is avoided by using double braces. If the ribs were unrestrained, either by a tape or a skirt of any fabric, the double braces would not be necessary, but as the chief purpose of the invention is to give a proper contour to what is called the hip portion of the dress form, the double braces are most essential. Inasmuch as the ribs at their tops are confined by a tape to a circumference corresponding with the size of the waist, it is reasonably clear that if they were expanded to their utmost tension at the hip portion a single set of braces would afford but slight resistance to contraction. But by the use of the double set of braces, with the arms fastened to the ribs at or near the same point, and diverging obliquely in opposite directions to collars, some distance apart, a triangle is formed which is well known to offer the most powerful resistance to contraction of any device used in the

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whole range of mechanics. The opposing force brought to bear by pushing the lower collar up and the upper collar down operates on the ribs to give shape to the hip portion of the skirt form closely resembling the human figure, and to oppose all tendency to contraction caused either by the ribs being too closely confined by the tape, or by the tight adjustment of the skirt to the contour of the dress form.

In determining the proper construction to be placed upon the second claim of the patent it is necessary to consider the action of the Patent Office upon the original application of the patentee, and also examine the prior art. In his original application the patentee sought to secure the following claims:

"1. A dress form consisting essentially of a central standard, one or more series of adjustable ribs, and corresponding series of braces or stretchers hinged to one or more runners or sliding blocks upon said standard and having their outer ends connected with said ribs, whereby the dress form may be expanded and contracted substantially as and for the purpose set forth.

"2. In combination with the standard *a*, rest *h*, sliding block *f*, and braces *e*, the ribs *c*, and elastic band *d*, substantially as and for the purpose described."

These broad and general claims were rejected by the Patent Office for the following reasons:

"The first claim is rejected on patents 202,713, Everett, April 23, 1878, and 207,351, Ferris, August 27, 1878, (both in dummies and hangers.)

"There is no novelty in the elements of the second claim, in view of the above patents in connection with the elastic band shown in 75,864, Keffer, March 17, 1868, (blocking and stretching hats,) which band is there used in the same way and for the same purpose as in applicant's device."

The patentee acquiesced in the rejection, and thereupon accepted his patent with its specific claims, the second of which is alleged to be infringed.

It is well settled that the second claim must be read and interpreted with reference to the rejected claims and to the prior state of the art, and cannot be so construed as to cover

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either what was rejected by the Patent Office, *Shepard* v. *Carrigan*, 116 U. S. 593; *Sutter* v. *Robinson*, 119 U. S. 530, or disclosed by prior devices.

A brief reference to the prior state of the art will serve to show what limitations should be placed upon the claim in question.

In 1878 a patent was issued to George W. Everett for a skirt exhibitor, in which there was a standard and a waist-band, divided into two segments. These segments were expanded and adjusted by a slide and socket mechanical device. The standard and adjustable waist-band perform the same function as the standard and tape in the Hall patent. Vertical ribs were afterwards added to the waist-band, but the owner of the patent did not claim such ribs as a part of his invention.

In 1870, a patent was granted to C. W. Wilson for an adjustable form for the manufacture of hoop-skirts. There is in this device also a standard and an adjustable waist-band, but in addition to these elements it was said there might be "as many ribs as are necessary hinged to the waist-band." These ribs are hinged near their lower ends, to jointed braces, whose inner ends are hinged to a block sliding on the standard, and the position of the sliding block is determined by a set screw. In the specification of this patent it is stated that "in operation the adjustable band block may be drawn out to make any size waist-band for skirts without its being necessary to increase the circumference of the bottom of the form, and, by simply moving the sleeve upon the shaft (standard) up or down, the size of the skirt is uniformly increased or diminished." This invention contains all of the elements substantially of the Hall patent, except the double braces. It has the standard, ribs, sliding blocks, and rests. It also has the brace-expanding mechanism for the lower part, which performs the same function as that in the Hall patent.

It appears, so far, that all the elements of the claim have been shown to have been anticipated except that of the double braces. But it is manifest that this element is not new. It was the principal novelty employed in the patent granted to

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S. B. Ferris, August 27, 1878, for a corset exhibitor. The invention consists of a central standard with a block at the top and also at the bottom. Between these blocks is an umbrella-like framework, the braces of which extend beyond the point of junction with the outside ends from the standard, and, pressing against the interior of the corset, impart shapeliness to it. The ribs or braces are triangulated on the standard the same in principle as the double braces in the Hall patent.

In the patent issued to F. A. Balch, in 1867, for a winding reel are shown the double braces, the standard, the sliding collars, and the rest with a set screw, comprising all of the expanding mechanism of the Hall patent. The outer ends of the braces are hinged on a blade which may be made as long as desired, and it would require only mechanical skill to adapt this reel to the device patented by Hall. Such an adaptation, produced by simply lengthening the ribs, would have secured the accomplishment of the same result in exactly the same way.

But, aside from these prior patents, the state of the art is perhaps more clearly illustrated in the device used for opening and shutting a common umbrella. In this device are found all the elements of the combination of the second claim. There are the standard, the collar with the rest, the double braces, and the ribs. Because the upper ribs are elongated so as to hold the fabric which covers them, it cannot be said that the double braces are different in principle and operation from those used in the patent in controversy. It would require but ordinary mechanical skill to convert a skirt form into an umbrella, or an umbrella into a skirt form like that described in the Hall patent.

It is conceded by the appellee that all of the elements of the second claim are old, except ribs *c*, which, it is claimed, constitute the new and patentable feature of the Hall invention; but, from the foregoing brief review of the prior art, we think it clearly shown that the ribs *c* do not constitute any new feature. They are shown in the Everett invention; in the Wilson patent, where it is said there may be as many as neces-

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sary; and in the common umbrella; also in the Ferris device for a corset exhibitor, where the function performed by the ribs constitutes the chief feature of the invention; and in the Balch reel short ribs are used, which might be lengthened to adapt the device to the dress form patented by Hall.

But it is urged on behalf of the appellee that the Hall patent differs from all previous devices in presenting a structure which, as an entirety, is radially expansible in all directions from a common centre, so as to preserve the symmetry of the form, whatever its diameter may be, and by the combination of the patent a new and useful result is thus attained which involves patentable novelty. In support of the validity of the patent, the principle stated in *Loom Co.* v. *Higgins*, 105 U. S. 580, 591, is invoked. In that case it was laid down by the court, as a general rule, though not an invariable one, "that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention." But we do not consider the Hall patent as coming within the principle there laid down, for the reason that the standard, the double braces, sliding blocks on the standard, and the rests to hold the blocks, as well as the ribs, which constitute the combination of the second claim, were not only found in the prior devices, but they separately and in combination with such devices performed the same function, and operated in substantially the same way as in the Hall patent. The combination of old elements which perform no new function and accomplish no new results does not involve patentable novelty. *Mosler Safe Co.* v. *Mosler*, 127 U. S. 354, 361; *Hailes* v. *Van Wormer*, 20 Wall. 353, 368; *Reckendorfer* v. *Faber*, 92 U. S. 347; *Pickering* v. *McCullough*, 104 U. S. 310, 318; *Peters* v. *Hanson*, 129 U. S. 541.

The use and purpose sought to be accomplished by the Hall patent was the radial expansion of the dress form, but it is well settled by the authorities that the end or purpose sought to be accomplished by the device is not the subject of a patent. The invention covered thereby must consist of new and useful means of obtaining that end. In other words, the subject of a patent is the device or mechanical means by which the desired

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result is to be secured. *Carver* v. *Hyde*, 16 Pet. 513, 519; *LeRoy* v. *Tatham*, 14 How. 156; *Corning* v. *Burden*, 15 How. 252; *Barr* v. *Duryee*, 1 Wall. 531; *Fuller* v. *Yentzer*, 94 U. S. 288.

Tested by these authorities the validity of the patent in question must be ascertained, not from a consideration of the purposes sought to be accomplished, but of the means pointed out for the attainment thereof, and if such means, adapted to effect the desired results, do not involve invention, they can derive no aid or support from the end which was sought to be secured. All that Hall did was to adapt the application of old devices to a new use, and this involved hardly more than mechanical skill, as was ruled in *Aron* v. *Manhattan Railway Co.*, 132 U. S. 85, where it was said: "The same device employed by him (the patentee) existed in earlier patents; all that he did was to adapt them to the special purpose to which he contemplated their application, by making modifications which did not require invention, but only the exercise of ordinary mechanical skill; and his right to a patent must rest upon the novelty of the means he contrived to carry his idea into practical application."

There is another test as to the validity of the second claim. If the Balch, Everett, Wilson, or Ferris patents, or even the umbrella, were subsequent in date to that of the Hall patent, they would constitute an infringement thereof, for the rule is well established that "that which infringes, if later, would anticipate if earlier." *Peters* v. *Active Mfg. Co.*, 129 U. S. 530, 537; *Thatcher Heating Co.* v. *Burtis*, 121 U. S. 286, 295; *Grant* v. *Walter*, 148 U. S. 547, 554; *Gordon* v. *Warder*, *ante*, 47.

If, however, the patent could be sustained at all, it would have to be restricted and confined to the specific combination described in the second claim as indicated by the letters of reference in the drawings, and each element specifically pointed out is an essential part thereof. *Duff* v. *Sterling Pump Co.*, 107 U. S. 636, 639; *Newton* v. *Furst & Bradley Co.*, 119 U. S. 373; *Bragg* v. *Fitch*, 121 U. S. 478; *Crawford* v. *Heysinger*, 123 U. S. 589; *Dryfoos* v. *Wiese*, 124 U. S. 32.

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For if not so restricted by the letters of reference the effect would be to make the claim coextensive with what was rejected in the Patent Office.

If any validity could be conceded to the patent, the limitation and restriction which would have to be placed upon it by the action of the Patent Office, and in view of the prior art, would narrow the claim, or confine it to the specific structure therein described, and as thus narrowed there could be no infringement on the part of appellants if a single element of the patentee's combination is left out of the appellants' device. *Sargent* v. *Hall Safe & Lock Co.*, 114 U. S. 63; *Eddy* v. *Dennis*, 95 U. S. 560; *McCormick* v. *Talcott*, 20 How. 402.

The appellants' dress form, which is alleged to infringe the combination of elements particularly described in the second claim of the Hall patent, does not contain several of the specific elements of said claim; it has a tubular standard, within which is a loose vertical rotable shaft extending above the end of the standard. Surrounding this shaft are several ribs. The shaft is screw-threaded at one portion with a left-hand thread, and at a portion above the left-hand thread there is a right-hand screw-thread. On each of these portions is a corresponding nut, so that the shaft being rotated in one direction will cause the nuts to approach each other, or, rotated in the opposite direction, the nuts will separate. Above the screw-threaded nuts is a fixed and immovable collar. To this collar and the movable nuts are hinged the braces which are similar to those described in the Hall patent. By turning the top of the standard either to the right or to the left the whole form is adjusted by one movement.

Comparing this device with the combination described in the Hall patent, it is found that there are a standard, double braces, and ribs, but there are no sliding blocks or rests, and the function of the standard is doubled. There is no sliding block whatever at the top of the upper braces, and the lower collar is a screw-threaded nut resting upon corresponding screw-threads in the standard. It is clear that the sliding blocks and the rests, two of the five elements specifically described in the Hall patent, are not employed in the dress form of the appel-

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lants. If the Hall patent was a valid pioneer invention, the doctrine of equivalents might be invoked with regard to the sliding blocks and rests, and thus a different question would be raised, but, being confined to the specific elements enumerated by letters of reference, it is neither entitled to a broad construction, nor can any doctrine of equivalents be invoked so as to make the appellants' device an infringement of the second claim in controversy.

Our conclusion, therefore, is that the Hall patent is invalid, and further, if it could be sustained at all, it would have to be in the most restricted form, and thus restricted, it is not infringed by the appellants. It follows, therefore, that in each case the judgment of the courts below must be

Reversed, and the cause remanded, with direction to dismiss the bill.

Mr. Justice Brown (with whom was Mr. Justice Shiras) dissenting.

In the construction of his device Hall took the principle of the common umbrella and of an adjustable reel for unwinding yarn, and by adding to it ribs and elastic bands, adapted it to an entirely different purpose, namely, to the construction of an adjustable dress form, which has largely supplanted those previously in use. While the changes made were not radical in their character, I think they were such as to involve invention within the rule stated in *Loom Co.* v. *Higgins*, 105 U. S. 580, 591; *The Barbed Wire Patent*, 143 U. S. 275; *Gandy* v. *Main Belting Co.*, 143 U. S. 587; and *Topliff* v. *Topliff*, 145 U. S. 156; and that the change made by the defendant in using a collar fixed to the standard for the upper sliding block, and a nut and threaded standard for the lower sliding block and rest of the Hall patent, was in fact the substitution of well-known equivalents, and does not exonerate them from the charge of infringement.

The Chief Justice did not sit in this case and took no part in its decision.

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THOMPSON v. SIOUX FALLS NATIONAL BANK.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

No. 53. Argued October 24, 25, 1893. — Decided November 20, 1893.

In an action at law against a bank to recover on a cheque drawn and issued by its cashier, if it be admitted that the cheque was obtained without consideration, and was invalid in the hands of the immediate payee, the plaintiff must prove either that he was a *bona fide* holder, or that the person from whom he received the paper had taken it for value without notice of defect in its inception.

A bank, knowing that the county treasurer of the county had not sufficient county funds in his hands to balance his official accounts, consented to give him a fictitious credit in order to enable him to impose upon the county commissioners, who were about to examine his accounts. They accordingly gave him a "cashier's check" for $16,571.61, which he endorsed and took to the commissioners. They received it, but refused to discharge him or his bondsmen, and placed the cheque and such funds as he had in cash in a box and delivered them to his bondsmen. The latter deposited the money and the cheque in another bank in the same place, which bank brought suit against the bank which issued the cheque to recover upon it. *Held*,

(1) That the circumstances under which the cheque was issued were a plain fraud upon the law, and also upon the county commissioners;

(2) That their receipt of it and turning it over to the sureties was a single act, intended to assist the sureties in protecting themselves, and was inconsistent with the idea of releasing them from their obligation;

(3) That the question whether the evidence did or did not establish the fact that the county was an innocent holder should have been submitted to the jury.

THIS was an action brought by the Sioux Falls National Bank, defendant in error, against the First National Bank, to recover the amount of the following cashier's cheque, issued by an officer of the defendant bank:

"No. 91. Sioux Falls, Dak., Jan. 12, 1886.

"THE FIRST NATIONAL BANK OF SIOUX FALLS.

"Pay to the order of C. K. Howard, Co. Treas., sixteen thousand five hundred and seventy-one and 61–100 dollars.

"$16,571.61. (Signed) W. F. FURBECK, Cash."

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Across the face of this was printed "cashier's check." It was endorsed "C. K. Howard, County Treasurer."

The complaint alleged in substance that the cheque was issued for value received, delivered to Howard, endorsed by him, and that "it came lawfully into the possession of the plaintiff, in the usual course of business," on January 13, 1886, and that the "plaintiff is now the legal owner and holder of the same."

The bank answered, admitting the drawing of the cheque, and alleged in substance that the cheque did not come lawfully into the possession of the bank in the usual course of business, and that its acquisition by the bank was *ultra vires*.

The action was begun January 14, 1886, two days after the cheque was drawn, against the then sole defendant, the First National Bank; and about six weeks thereafter, namely, March 1, an attachment was issued upon the ground that the defendant had or was about to assign and dispose of its property with intent to defraud its creditors, and levied upon the moneys, notes, drafts, stock, and other assets of the bank, in the aggregate estimated value of over $120,000. Of this property, the sheriff returned or tendered to the defendant on March 5 all except assets of the estimated value of $27,541.21, consisting of coin, notes, &c.

The issue of this attachment was followed by the failure of the bank, and the Comptroller of the Currency appointed Thompson, plaintiff in error, receiver on March 11. On March 31, 1886, the sheriff delivered to Thompson, as receiver, the assets remaining in his hands, in the above amount of $27,541.21. Acting under advice of the Comptroller, on December 28, 1886, the receiver applied to the court for an order substituting him as party defendant in the place of the bank, and the court thereupon made him an *additional* party. The receiver excepted to the order, claiming the absolute right of substitution.

Upon the trial, evidence was introduced tending to show the following facts: On January 12, 1886, the date of the cheque, Charles K. Howard was county treasurer of the county of Minnehaha, an office which he had held for several years, and

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was having his semi-annual settlement as such county treasurer with the board of county commissioners. From the time of its organization to the date of this settlement, Howard had kept his official deposit as treasurer with the First National Bank of Sioux Falls, of which J. B. Young and H. L. Hollister, down to a short time before the issue of this cheque, had been president and cashier respectively; and at the time of this settlement Young and Hollister, together with C. G. Coats and W. H. Corson, were the sureties of Howard upon his official bond.

Howard was confessedly a defaulter, that is, he had not funds of the county sufficient to meet his liabilities, and to enable him to make his settlement with the commissioners he had applied to the defendant bank for assistance. After he had checked over his accounts with the commissioners, he went to the defendant bank for $16,571.61, the amount needed. He had about $12,000 on hand in a box in the treasurer's vault, which, with the $16,571.61, would balance his accounts. He had nothing deposited to his credit at the bank. To make up the required amount he gave the bank three drafts upon Chicago, aggregating $15,000, telling the cashier, however, that he had no credit there which would obtain the payment of them. The bank thereupon gave him a deposit book showing a deposit to his credit of $15,625.01, which he exhibited to the commissioners, who said that no doubt that was all proper, but they would like to have some little further assurance that he had the money. He then went to the bank, procured and exhibited to the commissioners a letter, of which the following is a copy:

"First National Bank, Sioux Falls, Dak.

"*January* 12, 1886.

"The books of the bank show a credit in favor of the county of $15,625.01. If you wish you have the privilege of examining the books.

"R. J. WELLS, P't.
"W. F. FURBECK, Cas."

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The board would not make a settlement without the money or a certified cheque. Howard returned to the bank, and asked the cashier for a certified cheque, but was refused. The cashier thereupon gave him the cheque in suit, with the condition that he would retain possession of it, deliver it to no one, and return it in twenty minutes, and would also place to the credit of the county in the bank what money he had in his possession, as county treasurer, some twelve or fourteen thousand dollars. This was after the closing of the bank for the day's business.

Howard gave nothing for this cheque, nor was it charged to any one on the books of the bank. He did not return the cheque nor make any deposit whatever, but took it to the board of commissioners then in session, and endorsed it at the request of the board. That, with the county money he then had in his possession, was sufficient to balance his account and discharge his obligation to the county. Thereupon Hollister, Coats, and Corson, three of the four sureties upon his bond, through one Bailey, their attorney, demanded that they be released from further liability upon Howard's official bond.

On the following morning, namely, January 13, the board of county commissioners deeming Howard's sureties insufficient for the protection of the county, because one of the sureties, Young, had removed from the State, adopted a resolution requiring the treasurer to furnish additional freehold sureties in the penal sum of $50,000, and at the same time, at the request of the three remaining sureties, resolved that the funds presented to the board of county commissioners by the treasurer, in settlement of his accounts, be turned over to his bondsmen and the bondsmen put in charge of the office of county treasurer until the additional bond was furnished, the funds to be deposited and remain the funds of Minnehaha County.

The funds of the treasurer, including this cheque, were then placed in a tin box, and delivered into the hands of the bondsmen, who took them in the box to the Dakota National Bank in the city of Sioux Falls, and offered the same for deposit. In going to the Dakota National Bank they passed the First National Bank, which was located on the opposite side of the street. The Dakota National Bank refused to receive, give

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credit, or purchase the cheque without the endorsement of the bondsmen or indemnity from them. The cheque was, at the request of the bondsmen, presented to the First National Bank for payment, which was refused. The box containing the funds was left at the Dakota National Bank by the bondsmen during the noon hour. While the bondsmen and officers of the Dakota National were at dinner, or soon after this, Bailey, on behalf of the bondsmen, called at the plaintiff bank and had an interview with McKinney, its president, in which Bailey said he had been engaged on behalf of the bondsmen of Mr. Howard, that Young had left and they wished to be released, and that the office had been turned over to the bondsmen with the money. In this conversation McKinney expressed the wish to obtain the deposit for his own bank. Prior to this conversation he had made some inquiries of different parties about the county treasurer's deposit, and about the settlement and the cheque, and had asked if it was a straight cashier's cheque. Receiving a reply in the affirmative, he said: "I would like to have it; they would either pay it or close their doors." About 2 o'clock, the bondsmen, Hollister, Coats, and Corson, went back to the Dakota National Bank, took the box and money, including this cheque, went out of the back door of the bank, (which was in the same block and on the same side of the street as the plaintiff bank,) and, following along the river bank behind the buildings which border the river, entered the plaintiff bank through the back door, and passing through a sort of store-room to the directors' room or private office back of the main office, and in the presence of McKinney, emptied on the table the contents of the box, saying: "I have brought you the deposit," or "Here it is." McKinney and Hollister began counting the deposit of $27,236.63, and after the money was counted, the cashier, at the suggestion of Bailey, made out a deposit book in the name of "H. L. Hollister, C. G. Coats, and W. H. Corson, bondsmen," and credited them with the amount of the funds. McKinney knew at this time that these were the county funds, and that the depositors were the treasurer's sureties, in charge of his office and funds while he was getting an additional bond.

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Statement of the Case.

The cheque was not endorsed by the bondsmen, and they had no account at that bank. Hollister endorsed several other cheques making up the deposit, but was not asked to endorse this one. Bailey then said to McKinney, "That is a pretty good size cheque; you had better go and get your money on it." McKinney said that he would collect it or see that their doors did not open the next morning. Twice that afternoon plaintiff presented the cheque to the First National Bank for payment, which was refused upon the ground that plaintiff had no right to the cheque, and that it was given without consideration. In the evening a conference was held at the plaintiff bank between its officers and attorney, and those of the First National Bank, at which the plaintiff was again notified that the cheque was without consideration, and had been fraudulently diverted from the purpose for which it was issued, and was urged to charge the same back to the bondsmen. This the plaintiff bank refused to do, the plaintiff's cashier remarking that if the bank did not pay it they knew a way to make it.

The next morning, January 14, the plaintiff commenced this action. On January 18, the board of county commissioners, having found the treasurer's account correct, by resolution approved the same, and thereupon Howard tendered his resignation as treasurer, and C. L. Norton, cashier of the plaintiff bank, was appointed his successor. On the next day, January 19, by further resolution of said board, the bondsmen were required to turn over to the county commissioners all the evidences of deposit and all funds belonging to the county, and thereupon the cheque of the bondsmen in the sum of $27,236.63, certified by McKinney, president of the plaintiff bank, was accepted by the county commissioners in full discharge of the bondsmen for the funds received of the county January 13, and Norton as county treasurer receipted to the commissioners for that sum of money in currency. Prior to taking possession of Howard's funds and the cheque in suit by the county commissioners, there was evidence tending to show that the board was notified by one Wilkes not to take the cheque under consideration; that the payment of the cheque would be resisted. This testimony was disputed.

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Argument for Defendant in Error.

The case was removed for trial to Moody County, and the court, upon motion of the plaintiff at the close of the defendants' testimony, directed a verdict for the amount of the cheque, upon which judgment was rendered by the District Court for $18,417.24. The case was appealed to the Supreme Court of the Territory, where the judgment below was affirmed, and the defendant sued out a writ of error from this court.

Mr. Thomas B. McMartin for plaintiffs in error.

Mr. William A. Wilkes, *Mr. F. L. Boyce*, and *Mr. R. J. Wells* filed a brief for the First National Bank of Sioux Falls, plaintiff in error.

Mr. George A. Madill and *Mr. Cushman K. Davis* for defendant in error.

The District Court did not err in directing a verdict and in entering judgment for the plaintiff.

The instrument issued on January 12, 1886, by the First National Bank (plaintiff in error), payable "to the order of C. K. Howard, Co. treasurer," for the sum of $16,571.61, was a cashier's cheque. It is idle to discuss what other instrument known to the law merchant is similar to it or has some element in common with it. The fact is that it is a form of instrument in general use in the business of the country. It is issued by banks because of its convenience, and has been assigned and occupies a prominent and permanent place in commercial transactions because of its negotiability, after endorsement in blank by the payee, by mere delivery and because the confidence in it is coextensive with the character and responsibility of the bank issuing it. This cheque was made by the bank to Howard for the express and understood purpose of enabling him to make his settlement with the Board of County Commissioners. The plaintiffs in error are estopped from setting up any secret understanding as to it, had between Howard and the officers of the bank, contrary to the legal effect of the cheque itself and to the admitted purpose for which it was given.

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The cheque was regular upon its face. It was presented by Howard to the board as it was by the bank intended to be in settlement of his accounts. Howard endorsed it and the board took it in satisfaction. This exonerated the sureties from all liability up to and including that settlement.

The power of a national bank to issue such a cheque to its customer is as clear as its power to certify the cheque of such customer, and the power to do the latter has long been recognized and sanctioned by the courts. *Espy* v. *Bank of Cincinnati*, 18 Wall. 604, 620; *Merchants' Bank* v. *State Bank*, 10 Wall. 604; *First National Bank of Washington* v. *Whitman*, 94 U. S. 343; *Bull* v. *Bank of Kasson*, 123 U. S. 105. Nor can the authority of the cashier of a national bank to issue a cashier's cheque be questioned by the bank in a suit against it upon such cheque.

Nor can the bank be permitted in such suit to urge, as a defence, that the amount for which the cheque was issued exceeded a tenth part of the amount of the capital stock of the bank actually paid in by the stockholders. *Wyman* v. *Citizens' National Bank of Faribault*, 29 Fed. Rep. 734; *Gold Mining Co.* v. *National Bank*, 96 U. S. 640; *National Bank* v. *Matthews*, 98 U. S. 621; *National Bank* v. *Whitney*, 103 U. S. 99; *National Bank* v. *Graham*, 100 U. S. 699.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

As the cheque in this case is admitted to have been obtained without consideration, and to have been invalid in the hands of the immediate payee, the plaintiff, to sustain its own title, must prove either that it was itself a *bona fide* holder without notice, or that the county commissioners, of whom it received the paper, had taken the same for value without notice of any defect in its inception. *Lytle* v. *Lansing*, 147 U. S. 59.

The circumstances under which the cheque was issued were a plain fraud upon the law and also upon the county commissioners. It seems that Howard kept his deposit as county treasurer with the defendant bank, and had been personally

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interested with it in different enterprises. He says that, a few days before his semi-annual settlement, he had a talk with Mr. Wells, president of the bank, in which the latter agreed to assist him in this settlement. He told them that it would take about $15,000 to make the settlement. He proposed to the cashier to give him a note for the amount, but the cashier told him it would be better to make some drafts to cover that amount of credit. He thereupon made three drafts, aggregating $15,000, upon M. D. Steevers & Co. of Chicago, who had before this honored his drafts, at the same time telling the cashier that he had not the proper credit to obtain payment of them. The bank thereupon gave him a deposit book showing a balance of $15,625.01 on deposit. This the board refused to accept, and demanded a certified cheque, which the bank refused to give, but gave the cashier's cheque in suit.

At the time this cheque was issued, the bank had a capital stock of $50,000, and if this cheque be regarded as a loan, as it must be, it was in express violation of Revised Statutes, § 5200, which provides that "the total liabilities to any association, of any person, or of any company, corporation, or firm, for money borrowed, including, in the liabilities of a company or firm, the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of capital stock of such association actually paid in."

The substance of the transaction was, that the bank, with knowledge that Howard had not funds of the county sufficient to balance his accounts as treasurer, — in short, that he was a defaulter, — consented to give him a fictitious credit, in order to enable him to impose upon the county commissioners. But the vital question is, whether the commissioners received this cheque in the ordinary course of business, believing it to represent an actual debt of the bank to Howard as county treasurer to the amount of the cheque. To recover upon paper which has been diverted from its original destination and fraudulently put in circulation, the holder must show that he received it in good faith, in the ordinary course of business, and paid for it a valuable consideration. *Wardell* v. *Howell*, 9 Wend. 170; *Farmers' & Citizens' Bank* v. *Voxon*, 45 N. Y. 762.

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By the Compiled Laws of Dakota, § 4487, "an indorsee in due course" is defined as "one who in good faith, in the ordinary course of business, and for value, before its apparent maturity or presumptive dishonor, and without knowledge of its actual dishonor, acquires a negotiable instrument duly indorsed to him, or indorsed generally, or payable to the bearer." And by § 4739, "good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious." Applying the law thus stated to the facts of this case, it appeared that before the cheque was presented, the county commissioners had refused to receive a deposit book, as well as a written statement of the bank that Howard had a credit to the amount of $15,625.01 upon the books of the bank as a part of his official assets, and demanded either the money or a certified cheque, as they doubtless had a right to do. Indeed, it is doubtful whether the commissioners had a right to recognize anything but current money in the settlement of the treasurer's accounts. By the Compiled Laws of Dakota, § 1598, territorial warrants are receivable for general territorial taxes, county warrants for county taxes, city warrants for city taxes, school warrants for school taxes, "but United States Treasury notes or their equivalent only are receivable for such taxes as are or may be required by law to be paid in cash." And by § 1656: "If any county treasurer shall fail to make return, fail to make settlement, or fail to pay over all money with which he may stand charged, at the time and in the manner prescribed by law, it shall be the duty of the county clerk, on receiving instructions for that purpose from the territorial auditor, or from the county commissioners of his county, to cause suit to be instituted against such treasurer and his sureties," etc.

Now, if the county treasurer had no authority to receive anything but coin, Treasury notes, national bank notes, or other current money, it is difficult to see what authority the county commissioners had to accept anything less in the set-

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tlement of his accounts. If they have the authority to accept cheques and other evidences of debt, where does that authority cease? May they not also receive notes, drafts, bonds, or other obligations which in their opinion may then or thereafter be good? As was said in *Cawley* v. *People*, 95 Illinois, 249, 256, speaking of the duty of auditing boards: "They are limited and controlled in their official acts, and they are not, unless authorized, empowered to do or not to do official acts. In this class of cases they are empowered, and it is enjoined on the board, to require sufficient bond from the treasurer and to approve it. They have no power to dispense with the duty, nor can they, without a proper consideration, release sureties from their obligations under the bond. If they were to do so, in fraud of the rights of the people, the act would have no binding effect and would be void. . . . There can be no question that the treasurer could only discharge himself for county funds in his hands by paying to the county, in money, county orders or jury warrants. The statute requires him to pay in such funds. It is not intended that he may pay in promissory notes, cheques, drafts, and other paper." Indeed, it is doubtful whether the county commissioners who, under the laws of Dakota, are simply an auditing body, had any authority to receive moneys of the county from the treasurer, for which they gave no bonds, and whether their act in taking possession of his assets, including this cheque, was not beyond the scope of their authority. They did, however, receive the money and the cheque, and at the same time, and as a part of the same transaction, turned them over to the sureties upon his bond, although they did not at that time, or until six days thereafter, pass his accounts or release his sureties. What warrant they had for turning over these securities to the bondsmen does not appear, but there was evidently no intention on their part of releasing the sureties, nor was the county placed in any worse position by that act. If the commissioners had received this cheque believing it to have been issued in good faith and retained it, it is possible the county might have stood in the position of an innocent purchaser. But their receipt of it and their turning it over to the sureties

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was evidently a single act, and intended to assist the sureties in protecting themselves. It was wholly inconsistent with the idea of releasing them from their obligation.

Aside from the somewhat suspicious circumstances attending the sudden production of a cheque of this large amount, which could scarcely be said to be in the ordinary course of business, there was evidence tending to show that about the time of the receipt of the cheque, on January 12, Mr. Wright, the county attorney, was informed by the counsel of the bank that the board should not take the cheque into consideration; that the bank would defend against it, as in the hands of Howard, and refuse payment; and that the next day, when the board was in session, a similar notice was given to them. It is true that some of this testimony, with regard to the notice, is disputed; but in determining whether the case should have been left to the jury, or not, we are to consider only the uncontradicted facts. Beyond this, however, there is some testimony tending to show that the cheque was not delivered by Howard voluntarily, as such delivery involved a plain violation of the condition upon which he had received it; but was extorted by the bondsmen and commissioners under a show of force. If this be true, it was clearly not a receipt of the cheque in the ordinary course of business. Be this as it may, it does not appear that the county commissioners took any action prejudicial to their rights against the county treasurer and his sureties until the 18th, when his settlement was approved, and on the 19th the cheque of the bondsmen, certified by the president of the plaintiff bank, was received in full discharge of such bondsmen.

Without expressing an opinion of our own whether the evidence did or did not establish the fact that the county was an innocent holder for value of this cheque, we are clear that the testimony upon this point should have been submitted to the jury.

There was certainly evidence enough to go to the jury that the plaintiff bank as well as the sureties upon the bond received the paper with notice that its collection would be resisted. The sureties received the paper simply as bailee for

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the county. They paid no consideration for it. It simply passed through their hands to the plaintiff bank, which consented to receive it on deposit and to credit them with the amount.

With regard to the possession of the plaintiff bank, the evident anxiety of McKinney, its president, to obtain for it the treasurer's deposit; his inquiry whether it was a straight cashier's cheque; his threat that the bank should pay it or close its doors; the substitution of Norton, the cashier of this bank, for Howard as county treasurer; the suspicious manner in which the money was brought to the bank; the prompt commencement of the action against the defendant on the morning after the cheque was refused; the conversation on the following morning, the 15th, between the assistant cashier of the plaintiff bank and the editor of a local paper, in which the former said: "The Sioux Falls National Bank had done a great deal for me, and now was the time for me to stand by them; it was a matter of vital importance to them;" were all suspicious circumstances tending to throw grave doubt upon the claim of the plaintiff bank to be a *bona fide* holder of the paper. Add to this the fact that twice during the afternoon of the 13th the plaintiff bank presented the cheque for payment, which was refused upon the ground that it was given without consideration, and had been fraudulently diverted from the purpose for which it was issued; that this notice was repeated at a conference between the officers of the two banks the same evening, and the plaintiff bank requested to charge it back to the bondsmen, and it is too clear for argument that the plaintiff did not itself stand in the position of an innocent holder. Bad as the conduct of the defendant bank was in issuing the cheque, the testimony is calculated to engender a strong suspicion that the motive of the plaintiff bank in receiving it was to secure to itself the deposit of the county moneys, and perhaps also to crush out a rival institution.

While it is true the plaintiff bank credited the bondsmen with the amount of the cheque on its receipt, it parted with nothing upon the faith of it until nearly a week thereafter.

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If it had cancelled the cheque on the evening of the 13th, as it was requested to do, it would have done no more than the law required of it. The mere credit of a cheque upon the books of a bank, which may be cancelled at any time, does not make the bank a *bona fide* purchaser for value. If after such credit and before payment for value upon the faith thereof, the holder receives notice of the invalidity of the cheque, he cannot become a *bona fide* holder by subsequent payment. *Dresser* v. *Missouri &c. Construction Co.*, 93 U. S. 92; *Mann* v. *Second Nat. Bank*, 30 Kansas, 412; *Central Nat. Bank* v. *Valentine*, 18 Hun, 417; *Manf. Nat. Bank* v. *Newell*, 71 Wisconsin, 309; *Buller* v. *Harrison*, Cowp. 565.

The claim that defendant was estopped by its cheque to deny that the bank was indebted to the county in the amount of such cheque, depends practically upon the same considerations as the question of innocent purchaser. If, upon the faith of such representations, the county commissioners did any act prejudicial to the interests of the county, an estoppel might arise; but if, before such act was done, the commissioners were informed that the cheque was fictitious, they could not be said to have acted upon the faith of its representation, and there could be no estoppel. Even if such estoppel had arisen in favor of the county, it is, at least, doubtful whether the plaintiff bank could avail itself of it. *Deery* v. *Cray*, 5 Wall. 795; *Mayenborg* v. *Haynes*, 50 N. Y. 675.

We have not deemed it necessary to consider whether this cheque falls within the class upon which we have held that no action will lie in favor of the holder against the drawee before acceptance. *Bank of Republic* v. *Millard*, 10 Wall. 152; *First Nat. Bank of Washington* v. *Whitman*, 94 U. S. 343; *Bull* v. *Bank of Kasson*, 123 N. Y. 105.

In any view we have been able to take of this case, we think the question of plaintiff's title to this cheque and its right to recover upon the same should have been left to the jury under proper instructions.

The judgment of the court below is, therefore, reversed, and the case remanded to the Supreme Court of the State of

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Statement of the Case.

South Dakota with instructions to remand the case to the proper court of Moody County, and to direct the verdict and judgment to be set aside and a new trial granted.

MR. JUSTICE BREWER dissented.

ELLIOTT v. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

No. 71. Argued November 6, 7, 1893. — Decided November 20, 1893.

Though questions of negligence and contributory negligence are, ordinarily, questions of fact to be passed upon by a jury, yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury, and direct a verdict.

THIS case was commenced in the District Court of Clay County, Dakota Territory, on August 31, 1886, by the plaintiff in error, Biddena Elliott, widow of John Elliott, deceased, against the railway company to recover damages on account of the death of John Elliott, alleged to have been caused by the negligence of the defendant and its employés.

The defendant answered, a trial was had at the September term, 1886, and the plaintiff recovered a verdict for seven thousand dollars. Judgment having been entered thereon, the defendant appealed to the Supreme Court of the Territory, which reversed the judgment and remanded the case for a new trial. 5 Dakota, 523.

The case was again tried, though apparently in the District Court of Minnehaha County, at the April term, 1889, upon the same evidence that was presented on the first trial. A verdict was directed in favor of the defendant, and judgment entered thereon. Plaintiff appealed to the Supreme Court, which, on May 31, 1889, affirmed the judgment. Thereupon a writ of error was sued out from this court.

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Mr. Melvin Grigsby for plaintiff in error.

Mr. Heman H. Field, (with whom were *Mr. John W. Cary* and *Mr. Robert B. Tripp* on the brief,) for defendant in error.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

The question in this case is as to the liability of the company for the death of John Elliott. The company made three defences. One, that it was guilty of no negligence; second, that if there were any negligence, it was that of a fellow-servant; and, third, that Elliott was guilty of contributory negligence. The Supreme Court of the Territory, in its opinion filed when the case was first in that court, considered the last two defences as sustained, and, because thereof, reversed the judgment in favor of the plaintiff. All of them have been presented and fully argued in this court, but as we consider the third sufficient, it is unnecessary to notice the first two. We are of opinion that the deceased was guilty of contributory negligence, such as to bar any recovery. It is true that questions of negligence and contributory negligence are, ordinarily, questions of fact to be passed upon by a jury; yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury, and direct a verdict. *Railroad Co.* v. *Houston*, 95 U. S. 697; *Schofield* v. *Chicago, Milwaukee & St. Paul Railroad*, 114 U. S. 615; *Delaware, Lackawanna &c. Railroad Co.* v. *Converse*, 139 U. S. 469; *Aerkfetz* v. *Humphreys*, 145 U. S. 418.

What, then, are the facts concerning the accident? It took place at a station called Meckling, a hamlet of two or three houses, and of so little importance that at the time the company had no station agent there. The main track of the defendant's road ran eastward and westward in a straight line, and the ground was level. On the north side of this track was a siding, 728 feet in length from switch to switch, and distant from the main track at the maximum 16 feet. This

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siding was the only extra track at the place. About 100 feet east from the west switch was the depot, on the south of the track, and some 10 feet therefrom. Two hundred feet east of that was a small car house, 16 feet from the track. These were the only buildings on the depot grounds. No cars were standing on the track or siding. The day was clear, and there was nothing to prevent the deceased from seeing all that was going on. He was foreman of a section gang, and had been working on this track for 10 or more years. In expectation of a coming freight train, his men had placed their hand car on the siding. The train was due at 8.25 A.M., but was, perhaps, five or ten minutes late. It came from the west, and at this station made a double flying switch. This was accomplished by uncoupling the train at two places, thus breaking it into three sections. The first section, consisting of the engine and 18 cars, moved along the main track; but before the balance of the train reached the switch, (its speed having been checked by brakes,) that was turned so that two cars (constituting the second section, and under the control of a brakeman) passed on to the siding; the rear section, having been still further checked by brakes, the switch was reset, so that it passed on to the main track, following the first section. The rear section consisted of a flat car, a box car, a caboose, and an empty passenger coach, and was under the care of the conductor and one brakeman. As the second section was thrown by the flying switch on the siding, two of the men started to push the hand car towards the east, so as not to be struck by the approaching freight cars. The deceased, at the time the first section passed the car house, was standing some 16 feet west thereof, and four or five feet from the track, talking with one of his men. After a short conversation, the latter started towards the depot, while the deceased walked eastward along the track until he had passed a few feet beyond the car house, when he started hastily toward the siding. His attention had apparently been called by the approach of the two cars on the siding to the hand car, for he made some call to the men who were pushing that hand car. He crossed the main track diagonally, his face turned eastward. The rear

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section, coming along from the west, struck and crushed him. This rear section, when it passed the depot, was moving slowly, not faster than a walk, as one of the witnesses testified. That it was moving quite slowly is evident from the fact that it came to a stop after two cars and the caboose had passed over the body of the deceased, and this though no especial effort was made to check them after the deceased had been struck, the conductor and brakeman on that section being unaware of the accident. When he started to cross the track this approaching section was not to exceed 25 or 30 feet from him.

It thus appears that the deceased, an experienced railroad man, on a bright morning, and with nothing to obstruct his vision, starts along and across a railroad track, with which he was entirely familiar, with cars approaching and only 25 or 30 feet away, and before he gets across that track is overtaken by those cars and killed. But one explanation of his conduct is possible, and that is that he went upon the track without looking to see whether any train was coming. Such omission has been again and again, both as to travellers on the highway and employés on the road, affirmed to be negligence. The track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom. It may be, as is urged, that his motive was to assist in getting the hand car out of the way of the section moving on the siding. But whatever his motive, the fact remains that he stepped on the track in front of an approaching train, without looking, or taking any precautions for his own safety.

This is not a case in which one, placed in a position of danger through the negligence of the company, confused by his surroundings, makes perhaps a mistake in choice as to the way of escape, and is caught in an accident. For here the deceased was in no danger. He was standing in a place of safety on the south of the main track. He went into a place of danger from a place of safety, and went in without taking the ordinary precautions imperatively required of all who place themselves in a similar position of danger.

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The trial court was right in holding that he was guilty of contributory negligence. So, without considering the other questions presented in the record, the judgment will be affirmed.

As since the decision by the Supreme Court of the Territory that Territory has been admitted into the Union as the two States of North Dakota and South Dakota, and as the counties of the trial are in the State of South Dakota, the mandate will go to the Supreme Court of that State.

Affirmed.

UNITED STATES v. RODGERS.

CERTIFICATE OF DIVISION IN OPINION FROM THE EASTERN DISTRICT OF MICHIGAN.

No. 30. Submitted April 21, 1893. — Decided November 20, 1893.

The term "high seas," as used in the provision in Rev. Stat., § 5346, that "every person who, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, on board any vessel belonging in whole or part to the United States, or any citizen thereof, with a dangerous weapon, or with intent to perpetrate any felony, commits an assault upon another shall be punished," etc., is applicable to the open, unenclosed waters of the Great Lakes, between which the Detroit River is a connecting stream.

The courts of the United States have jurisdiction, under that section of the Revised Statutes, to try a person for an assault with a dangerous weapon, committed on a vessel belonging to a citizen of the United States, when such vessel is in the Detroit River, out of the jurisdiction of any particular State, and within the territorial limits of the Dominion of Canada.

The limitation of jurisdiction by the qualification that the offences punishable are committed on vessels in any arm of the sea, or in any river, haven, creek, basin, or bay "without the jurisdiction of any particular State," which means without the jurisdiction of any State of the Union, does not apply to vessels on the "high seas" of the lakes, but only to vessels on the waters designated as connecting with them; and so far as vessels on those seas are concerned, there is no limitation named to the authority of the United States.

In February, 1888, the defendant, Robert S. Rodgers and others, were indicted in the District Court of the United States

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for the Eastern District of Michigan for assaulting, in August, 1887, with a dangerous weapon, one James Downs, on board of the steamer Alaska, a vessel belonging to citizens of the United States, and then being within the admiralty jurisdiction of the United States, and not within the jurisdiction of any particular State of the United States, viz. within the territorial limits of the Dominion of Canada.

The indictment contained six counts, charging the offence to have been committed in different ways, or with different intent, and was remitted to the Circuit Court for the Sixth Circuit of the Eastern District of Michigan. There the defendant Rodgers filed a plea to the jurisdiction of the court, alleging that it had no jurisdiction of the matters charged, as appeared on the face of the indictment, and to the plea a demurrer was filed. Upon this demurrer the judges of the Circuit Court were divided in opinion, and they transmitted to this court the following certificate of division:

"*Certificate of Division of Opinion.*

"United States of America. The Circuit Court of the United States for the Sixth Circuit and Eastern District of Michigan.

"The United Sates
vs.
Robert S. Rodgers.

"The defendant in this cause was indicted on the twenty-fourth day of February, in the year of our Lord one thousand eight hundred and eighty-eight, in the District Court of the United States for the Eastern District of Michigan, together with John Gustave Beyers and others, charged, under section 5346 of the Revised Statutes of the United States, with having made an assault with dangerous weapons upon one James Downs, the assault having taken place on the steamer Alaska, a vessel owned by citizens of the United States, while such vessel was in the Detroit River, out of the jurisdiction of any particular State of the United States and within the territorial limits of the Dominion of Canada, and the said Robert S. Rodgers, and the others indicted with him, having first, after

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the assault, come into the United States in the Eastern District of Michigan.

"On the twentieth day of September, in the year of our Lord one thousand eight hundred and eighty-nine, the defendant Rodgers was arrested, and on the same day the indictment was, on motion of the United States attorney for the Eastern District of Michigan, and by order of the District Court for such district, remitted to the Circuit Court for such district, and, with all proceedings theretofore taken, certified to such Circuit Court.

"On the twenty-third day of September, in the year of our Lord one thousand eight hundred and eighty-nine, the defendant, on being called upon to plead in the Circuit Court of the United States for the Eastern District of Michigan, by permission of the court pleaded in abatement to the jurisdiction of the court, claiming that under section 5346 of the Revised Statutes of the United States the courts of the United States have no jurisdiction of offences committed in the Detroit River on a vessel of the United States within the territorial limits of the Dominion of Canada.

"The United States, by C. P. Black, United States attorney, and Charles T. Wilkins, assistant United States attorney for the Eastern District of Michigan, demurred to such plea, and the defendant joined on demurrer.

"The matter of the plea of the jurisdiction coming on to be heard in the Circuit Court of the United States for the Eastern District of Michigan, on the third day of October, in the year of our Lord one thousand eight hundred and eighty-nine, before the circuit and district judges, and the defendant being present in court, the said circuit and district judges were divided in opinion on the question: '*Whether the courts of the United States have jurisdiction, under section 5346 of the Revised Statutes of the United States, to try a person for an assault, with a dangerous weapon, committed on a vessel belonging to a citizen of the United States, when such vessel is in the Detroit River, out of the jurisdiction of any particular State and within the territorial limits of the Dominion of Canada.*'

"And so, at the request of the defendant and of the United

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States attorney for this district, the circuit and district judges do hereby at the same term state this point upon which they disagree, and hereby direct the same to be certified under the seal of the Circuit Court of the United States for the Eastern District of Michigan to the Supreme Court of the United States at its next session, for its opinion thereon.

"HOWELL E. JACKSON, *Circuit Judge.*

"HENRY B. BROWN, *District Judge.*"

Section 5346 of the Revised Statutes, upon which the indictment was found, is as follows:

"SEC. 5346. Every person who, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, on board any vessel belonging in whole or part to the United States, or any citizen thereof, with a dangerous weapon, or with intent to perpetrate any felony, commits an assault on another shall be punished by a fine of not more than three thousand dollars and by imprisonment at hard labor not more than three years."

The statute relating to the place of trial in this case is contained in section 730 of the Revised Statutes, which is as follows:

"SEC. 730. The trial of all offences committed upon the high seas or elsewhere, out of the jurisdiction of any particular State or district, shall be in the district, where the offender is found or into which he is first brought."

Mr. Assistant Attorney General Parker for the United States.

No appearance for Rodgers.

MR. JUSTICE FIELD delivered the opinion of the court.

Several questions of interest arise upon the construction of section 5346 of the Revised Statutes, upon which the indict-

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ment in this case was found. The principal one is whether the term "high seas," as there used, is applicable to the open, unenclosed waters of the Great Lakes, between which the Detroit River is a connecting stream. The term was formerly used, particularly by writers on public law, and generally in official communications between different governments, to designate the open, unenclosed waters of the ocean, or of the British seas, outside of their ports and havens. At one time it was claimed that the ocean, or portions of it, were subject to the exclusive use of particular nations. The Spaniards, in the 16th century, asserted the right to exclude all others from the Pacific Ocean. The Portuguese claimed, with the Spaniards, under the grant of Pope Alexander VI., the exclusive use of the Atlantic Ocean west and south of a designated line. And the English, in the 17th century, claimed the exclusive right to navigate the seas surrounding Great Britain. Woolsey on International Law, § 55.

In the discussions which took place in support of and against these extravagant pretensions the term "high seas" was applied, in the sense stated. It was also used in that sense by English courts and law writers. There was no discussion with them as to the waters of other seas. The public discussions were generally limited to the consideration of the question whether the high seas, that is, the open, unenclosed seas, as above defined, or any portion thereof, could be the property or under the exclusive jurisdiction of any nation, or whether they were open and free to the navigation of all nations. The inquiry in the English courts was generally limited to the question whether the jurisdiction of the admiralty extended to the waters of bays and harbors, such extension depending upon the fact whether they constituted a part of the high seas.

In his treatise on the rights of the sea, Sir Matthew Hale says: "The sea is either that which lies within the body of a county, or without. That arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county, and, therefore, within the jurisdiction of the

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sheriff or coroner. That part of the sea which lies not within the body of a county is called the main sea or ocean." De Jure Maris, c. iv. By the "main sea" Hale here means the same thing expressed by the term "high sea" — "*mare altum*," or "*le haut mer*."

In *Waring* v. *Clarke*, 5 How. 440, 453, this court said that it had been frequently adjudicated in the English common law courts since the restraining statutes of Richard II. and Henry IV., "that high seas mean that portion of the sea which washes the open coast." In *United States* v. *Grush*, 5 Mason, 290, it was held by Mr. Justice Story, in the United States Circuit Court, that the term "high seas," in its usual sense, expresses the unenclosed ocean or that portion of the sea which is without the *fauces terræ* on the sea coast, in contradistinction to that which is surrounded or enclosed between narrow headlands or promontories. It was the open, unenclosed waters of the ocean, or the open, unenclosed waters of the sea, which constituted the "high seas" in his judgment. There was no distinction made by him between the ocean and the sea, and there was no occasion for any such distinction. The question in issue was whether the alleged offences were committed within a county of Massachusetts on the sea coast, or without it, for in the latter case they were committed upon the high seas and within the statute. It was held that they were committed in the county of Suffolk, and thus were not covered by the statute.

If there were no seas other than the ocean, the term "high seas" would be limited to the open, unenclosed waters of the ocean. But as there are other seas besides the ocean, there must be high seas other than those of the ocean. A large commerce is conducted on seas other than the ocean and the English seas, and it is equally necessary to distinguish between their open waters and their ports and havens, and to provide for offences on vessels navigating those waters and for collisions between them. The term "high seas" does not, in either case, indicate any separate and distinct body of water; but only the open waters of the sea or ocean, as distinguished from ports and havens and waters within narrow headlands

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on the coast. This distinction was observed by Latin writers between the ports and havens of the Mediterranean and its open waters — the latter being termed the high seas.[1] In that sense the term may also be properly used in reference to the open waters of the Baltic and the Black Sea, both of which are inland seas, finding their way to the ocean by a narrow and distant channel. Indeed, wherever there are seas in fact, free to the navigation of all nations and people on their borders, their open waters outside of the portion "surrounded or enclosed between narrow headlands or promontories," on the coast, as stated by Mr. Justice Story, or "without the body of a county," as declared by Sir Matthew Hale, are properly characterized as high seas, by whatever name the bodies of water of which they are a part may be designated. Their names do not determine their character. There are, as said above, high seas on the Mediterranean, (meaning outside of the enclosed waters along its coast,) upon which the principal commerce of the ancient world was conducted and its great naval battles fought. To hold that on such seas there are no high seas, within the true meaning of that term, that is, no open, unenclosed waters, free to the navigation of all nations and people on their borders, would be to place upon that term a narrow and contracted meaning. We prefer to use it in its true sense, as applicable to the open, unenclosed waters of all seas, than to adhere to the common meaning of the term two centuries ago, when it was generally limited to the open waters of the ocean and of seas surrounding Great Britain, the freedom of which was then the principal subject of discussion. If it be conceded, as we think it must be, that the open, unenclosed waters of the Mediterranean are high seas, that concession is a sufficient answer to the claim that the high seas always denote the open waters of the ocean.

Whether the term is applied to the open waters of the

[1] "Insula *portum*
Efficit objectu laterum, quibus omnis ab *alto*
Frangitur, inque sinus scindit sese unda reductos."
— *The Æneid, Lib.* 1, v. 159–161.

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ocean or of a particular sea, in any case, will depend upon the context or circumstances attending its use, which in all cases affect, more or less, the meaning of language. It may be conceded that if a statement is made that a vessel is on the high seas, without any qualification by language or circumstance, it will be generally understood as meaning that the vessel is upon the open waters of one of the oceans of the world. It is true, also, that the ocean is often spoken of by writers on public law as *the sea*, and characteristics are then ascribed to the sea generally which are properly applicable to the ocean alone; as, for instance, that its open waters are the highway of all nations. Still the fact remains that there are other seas than the ocean whose open waters constitute a free highway for navigation to the nations and people residing on their borders, and are not a free highway to other nations and people, except there be free access to those seas by open waters or by conventional arrangements.

As thus defined, the term would seem to be as applicable to the open waters of the great Northern lakes as it is to the open waters of those bodies usually designated as seas. The Great Lakes possess every essential characteristic of seas. They are of large extent in length and breadth; they are navigable the whole distance in either direction by the largest vessels known to commerce; objects are not distinguishable from the opposite shores; they separate, in many instances, States, and in some instances constitute the boundary between independent nations; and their waters, after passing long distances, debouch into the ocean. The fact that their waters are fresh and not subject to the tides, does not affect their essential character as seas. Many seas are tideless, and the waters of some are saline only in a very slight degree.

The waters of Lake Superior, the most northern of these lakes, after traversing nearly 400 miles, with an average breadth of over 100 miles, and those of Lake Michigan, which extend over 350 miles, with an average breadth of 65 miles, join Lake Huron, and, after flowing about 250 miles, with an average breadth of 70 miles, pass into the river St. Clair; thence through the small lake of St. Clair into the Detroit

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River; thence into Lake Erie and, by the Niagara River, into Lake Ontario; whence they pass, by the river St. Lawrence, to the ocean, making a total distance of over 2000 miles. Ency. Britannica, vol. 21, p. 178. The area of the Great Lakes, in round numbers, is 100,000 square miles. Ibid. vol. 14, p. 217. They are of larger dimensions than many inland seas which are at an equal or greater distance from the ocean. The waters of the Black Sea travel a like distance before they come into contact with the ocean. Their first outlet is through the Bosphorus, which is about 20 miles long and for the greater part of its way less than a mile in width, into the sea of Marmora, and through that to the Dardanelles, which is about 40 miles in length and less than four miles in width, and then they find their way through the islands of the Greek Archipelago, up the Mediterranean Sea, past the Straits of Gibraltar to the ocean, a distance, also, of over 2000 miles.

In the *Genesee Chief case*, 12 How. 443, this court, in considering whether the admiralty jurisdiction of the United States extended to the Great Lakes, and speaking, through Chief Justice Taney, of the general character of those lakes, said: "These lakes are, in truth, inland seas. Different States border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different States and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas applies with equal force to the lakes. There is an equal necessity for the instance and for the prize power of the admiralty court to administer international law, and if the one cannot be established, neither can the other." (p. 453.)

After using this language, the Chief Justice commented upon the inequality which would exist, in the administration of justice, between the citizens of the States on the lakes, if, on account of the absence of tide water in those lakes, they were not entitled to the remedies afforded by the grant of

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admiralty jurisdiction of the Constitution, and the citizens of the States bordering on the ocean or upon navigable waters affected by the tides. The court, perceiving that the reason for the exercise of the jurisdiction did not in fact depend upon the tidal character of the waters, but upon their practical navigability for the purposes of commerce, disregarded the test of tide water prevailing in England as inapplicable to our country with its vast extent of inland waters. Acting upon like considerations in the application of the term "high seas" to the waters of the Great Lakes, which are equally navigable, for the purposes of commerce, in all respects, with the bodies of water usually designated as seas, and are in no respect affected by the tidal or saline character of their waters, we disregard the distinctions made between salt and fresh water seas, which are not essential, and hold that the reason of the statute, in providing for protection against violent assaults on vessels in tidal waters, is no greater but identical with the reason for providing against similar assaults on vessels in navigable waters that are neither tidal nor saline. The statute was intended to extend protection to persons on vessels belonging to citizens of the United States, not only upon the high seas, but in all navigable waters of every kind out of the jurisdiction of any particular State, whether moved by the tides or free from their influence.

The character of these lakes as seas was recognized by this court in the recent *Chicago Lake Front case*, where we said: "These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide." "In other respects," we added, "they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes." *Illinois Central Railroad* v. *Illinois*, 146 U. S. 387, 435.

It is to be observed also that the term "high" in one of its significations is used to denote that which is common, open,

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and public. Thus every road or way or navigable river which is used freely by the public is a "high" way. So a large body of navigable water other than a river, which is of an extent beyond the measurement of one's unaided vision, and is open and unconfined, and not under the exclusive control of any one nation or people, but is the free highway of adjoining nations or people, must fall under the definition of "high seas" within the meaning of the statute. We may as appropriately designate the open, unenclosed waters of the lakes as the high seas of the lakes, as to designate similar waters of the ocean as the high seas of the ocean, or similar waters of the Mediterranean as the high seas of the Mediterranean.

The language of section 5346, immediately following the term "high seas," declaring the penalty for violent assaults when committed on board of a vessel in any arm of the sea or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, equally as when committed on board of a vessel on the high seas, lends force to the construction given to that term. The language used must be read in conjunction with that term, and as referring to navigable waters out of the jurisdiction of any particular State, but connecting with the high seas mentioned. The Detroit River, upon which was the steamer Alaska at the time the assault was committed, connects the waters of Lake Huron (with which, as stated above, the waters of Lake Superior and Lake Michigan join) with the waters of Lake Erie, and separates the Dominion of Canada from the United States, constituting the boundary between them, the dividing line running nearly midway between its banks, as established by commissioners, pursuant to the treaty between the two countries. 8 Stat. 274, 276. The river is about 22 miles in length and from one to three miles in width, and is navigable at all seasons of the year by vessels of the largest size. The number of vessels passing through it each year is immense. Between the years 1880 and 1892, inclusive, they averaged from thirty-one to forty thousand a year, having a tonnage varying from sixteen to twenty-four

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millions.[1] In traversing the river they are constantly passing from the territorial jurisdiction of the one nation to that of the other. All of them, however, so far as transactions had on board are concerned, are deemed to be within the country of their owners. Constructively they constitute a part of the territory of the nation to which the owners belong. Whilst they are on the navigable waters of the river they are within the admiralty jurisdiction of that country. This jurisdiction is not changed by the fact that each of the neighboring nations may in some cases assert its own authority over persons on such vessels in relation to acts committed by them within its territorial limits. In what cases jurisdiction by each country will be thus asserted and to what extent, it is not necessary to inquire, for no question on that point is presented for our consideration. The general rule is that the country to which the vessel belongs will exercise jurisdiction over all matters affecting the vessel or those belonging to her, without interference of the local government, unless they involve its peace, dignity, or tranquillity, in which case it may assert its authority. *Wildenhus's case*, 120 U. S. 1, 12; Halleck on International Law, c. vii, § 26, p. 172. The admiralty jurisdiction of the country of the owners of the steamer upon which the offence charged was committed is not denied. They being citizens of

[1] The following statement, furnished by Colonel O. M. Poe, of the Engineer Corps, shows the traffic through Detroit River for the years indicated:

Year.	Number of Vessels.	Registered Tonnage.	Year.	Number of Vessels.	Registered Tonnage.
1880.....	40,521	20,235,249	1886.....	38,261	18,968,065
1881.....	35,888	17,572,240	1887.....	38,125	18,864,250
1882.....	35,199	17,872,182	1888.....	31,404	19,099,060
1883.....	40,385	17,695,174	1889.....	32,415	19,646,000
1884.....	38,742	18,045,949	1890.....	35,640	21,684,000
1885.....	34,921	16,777,828	1891.....	34,251	22,160,000
			1892.....	33,860	24,785,000

Colonel Poe adds: "This statement does not include Canadian vessels, a large number of which use this channel, nor does it include any vessels not clearing from the various custom houses. Were these included, a considerably greater showing could be made. They are not included because the statistics cannot be obtained."

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the United States, and the steamer being upon navigable waters, it is deemed to be within the admiralty jurisdiction of the United States. It was, therefore, perfectly competent for Congress to enact that parties on board committing an assault with a dangerous weapon should be punished when brought within the jurisdiction of the District Court of the United States. But it will hardly be claimed that Congress by the legislation in question intended that violent assaults committed upon persons on vessels owned by citizens of the United States in the Detroit River, without the jurisdiction of any particular State, should be punished, and that similar offences upon persons on vessels of like owners upon the adjoining lakes should be unprovided for. If the law can be deemed applicable to offences committed on vessels in any navigable river, haven, creek, basin, or bay, connecting with the lakes, out of the jurisdiction of any particular State, it would not be reasonable to suppose that Congress intended that no remedy should be afforded for similar offences committed on vessels upon the lakes, to which the vessels on the river, in almost all instances, are directed, and upon whose waters they are to be chiefly engaged. The more reasonable inference is that Congress intended to include the open, unenclosed waters of the lakes under the designation of high seas. The term, in the eye of reason, is applicable to the open, unenclosed portion of all large bodies of navigable waters, whose extent cannot be measured by one's vision, and the navigation of which is free to all nations and people on their borders, by whatever names those bodies may be locally designated. In some countries small lakes are called seas, as in the case of the Sea of Galilee, in Palestine. In other countries large bodies of water, greater than many bodies denominated seas, are called lakes, gulfs, or basins. The nomenclature, however, does not change the real character of either, nor should it affect our construction of terms properly applicable to the waters of either. By giving to the term "high seas" the construction indicated, there is consistency and sense in the whole statute, but there is neither if it be disregarded. If the term applies to the open, unenclosed waters of the lakes, the appli-

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cation of the legislation to the case under indictment cannot be questioned, for the Detroit River is a water connecting such high seas, and all that portion which is north of the boundary line between the United States and Canada is without the jurisdiction of any State of the Union. But if they be considered as not thus applying, it is difficult to give any force to the rest of the statute without supposing that Congress intended to provide against violence on board of vessels in navigable rivers, havens, creeks, basins, and bays, without the jurisdiction of any particular State, and intentionally omitted the much more important provision for like violence and disturbances on vessels upon the Great Lakes. All vessels in any navigable river, haven, creek, basin, or bay of the lakes, whether within or without the jurisdiction of any particular State, would some time find their way upon the waters of the lakes; and it is not a reasonable inference that Congress intended that the law should apply to offences only on a limited portion of the route over which the vessels were expected to pass, and that no provision should be made for such offences over a much greater distance on the lakes.

Congress in thus designating the open, unenclosed portion of large bodies of water, extending beyond one's vision, naturally used the same term to indicate it as was used with reference to similar portions of the ocean or of bodies which had been designated as seas. When Congress, in 1790, first used that term the existence of the Great Lakes was known; they had been visited by great numbers of persons in trading with the neighboring Indians, and their immense extent and character were generally understood. Much more accurate was this knowledge when the act of March 3, 1825, was passed, 4 Stat. 115, c. 65, and when the provisions of section 5346 were reënacted in the Revised Statutes in 1874. In all these cases, when Congress provided for the punishment of violence on board of vessels, it must have intended that the provision should extend to vessels on those waters the same as to vessels on seas, technically so called. There were no bodies of water in the United States to any portion of which the term "high seas" was applicable if not to the open,

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unenclosed waters of the Great Lakes. It does not seem reasonable to suppose that Congress intended to confine its legislation to the high seas of the ocean, and to its navigable rivers, havens, creeks, basins, and bays, without the jurisdiction of any State, and to make no provision for offences on those vast bodies of inland waters of the United States. There are vessels of every description on those inland seas now carrying on a commerce greater than the commerce on any other inland seas of the world. And we cannot believe that the Congress of the United States purposely left for a century those who navigated and those who were conveyed in vessels upon those seas without any protection.

The statute under consideration provides that every person who, upon the high seas or in any river connecting with them, as we construe its language, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, commits, on board of any vessel belonging in whole or in part to the United States, or any citizen thereof, an assault on another with a dangerous weapon or with intent to perpetrate a felony, shall be punished, etc. The Detroit River, from shore to shore, is within the admiralty jurisdiction of the United States, and connects with the open waters of the lakes — high seas, as we hold them to be, within the meaning of the statute. From the boundary line, near its centre, to the Canadian shore it is out of the jurisdiction of the State of Michigan. The case presented is therefore directly within its provisions. The act of Congress of September 4, 1890, 26 Stat. 424, c. 874, (1 Sup. to the Rev. Stat. chap. 874, p. 799,) providing for the punishment of crimes subsequently committed on the Great Lakes, does not, of course, affect the construction of the law previously existing.

We are not unmindful of the fact that it was held by the Supreme Court of Michigan in *People* v. *Tyler*, 7 Michigan, 161, that the criminal jurisdiction of the Federal courts did not extend to offences committed upon vessels on the lakes. The judges who rendered that decision were able and distinguished; but that fact, whilst it justly calls for a careful consideration of their reasoning, does not render their conclu-

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sion binding or authoritative upon this court. Their opinions show that they did not accept the doctrine extending the admiralty jurisdiction to cases on the lakes and navigable rivers, which is now generally, we might say almost universally, received as sound by the judicial tribunals of the country. It is true, as there stated, that, as a general principle, the criminal laws of a nation do not operate beyond its territorial limits, and that to give any government, or its judicial tribunals, the right to punish any act or transaction as a crime, it must have occurred within those limits. We accept this doctrine as a general rule, but there are exceptions to it as fully recognized as the doctrine itself. One of those exceptions is that offences committed upon vessels belonging to citizens of the United States, within their admiralty jurisdiction, (that is, within navigable waters,) though out of the territorial limits of the United States, may be judicially considered when the vessel and parties are brought within their territorial jurisdiction. As we have before stated, a vessel is deemed part of the territory of the country to which she belongs. Upon that subject we quote the language of Mr. Webster, while Secretary of State, in his letter to Lord Ashburton of August, 1842. Speaking for the government of the United States, he stated with great clearness and force the doctrine which is now recognized by all countries. He said: "It is natural to consider the vessels of a nation as parts of its territory, though at sea, as the State retains its jurisdiction over them; and, according to the commonly received custom, this jurisdiction is preserved over the vessels even in parts of the sea subject to a foreign dominion. This is the doctrine of the law of nations, clearly laid down by writers of received authority, and entirely conformable, as it is supposed, with the practice of modern nations. If a murder be committed on board of an American vessel by one of the crew upon another or upon a passenger, or by a passenger on one of the crew or another passenger, while such vessel is lying in a port within the jurisdiction of a foreign State or sovereignty, the offence is cognizable and punishable by the proper court of the United States in the same manner as if such offence had

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been committed on board the vessel on the high seas. The law of England is supposed to be the same. It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive. We do not so consider or so assert it. For any unlawful acts done by her while thus lying in port, and for all contracts entered into while there, by her master or owners, she and they must, doubtless, be answerable to the laws of the place. Nor, if her master or crew, while on board in such port, break the peace of the community by the commission of crimes, can exemption be claimed for them. But, nevertheless, the law of nations, as I have stated it, and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but into ports and harbors, or wheresoever else they may be water-borne, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself." 6 Webster's Works, 306, 307.

We do not accept the doctrine that, because by the treaty between the United States and Great Britain the boundary line between the two countries is run through the centre of the lakes, their character as seas is changed, or that the jurisdiction of the United States to regulate vessels belonging to their citizens navigating those waters and to punish offences committed upon such vessels, is in any respect impaired. Whatever effect may be given to the boundary line between the two countries, the jurisdiction of the United States over the vessels of their citizens navigating those waters and the persons on board remains unaffected. The limitation to the jurisdiction by the qualification that the offences punishable are committed on vessels in any arm of the sea, or in any river, haven, creek, basin, or bay "without the jurisdiction of any particular State," which means without the jurisdiction of any State of the Union, does not apply to vessels on the "high

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seas" of the lakes, but only to vessels on the waters designated as connecting with them. So far as vessels on those seas are concerned, there is no limitation named to the authority of the United States. It is true that lakes, properly so called, that is, bodies of water whose dimensions are capable of measurement by the unaided vision, within the limits of a State, are part of its territory and subject to its jurisdiction, but bodies of water of an extent which cannot be measured by the unaided vision, and which are navigable at all times in all directions, and border on different nations or States or people, and find their outlet in the ocean as in the present case, are seas in fact, however they may be designated. And seas in fact do not cease to be such, and become lakes, because by local custom they may be so called.

In our judgment the District Court of the Eastern District of Michigan had jurisdiction to try the defendant upon the indictment found, and it having been transferred to the Circuit Court, that court had jurisdiction to proceed with the trial, and the demurrer to its jurisdiction should have been overruled. Our opinion, in answer to the certificate, is that

The courts of the United States have jurisdiction, under section 5346 of the Revised Statutes, to try a person for an assault, with a dangerous weapon, committed on a vessel belonging to a citizen of the United States, when such vessel is in the Detroit River, out of the jurisdiction of any particular State, and within the territorial limits of the Dominion of Canada; and it will be returned to the Circuit Court of the United States for the Sixth Circuit and Eastern District of Michigan, and it is so ordered.

Mr. Justice Gray dissenting.

The opinion of the majority of the court is avowedly based upon the hypothesis that the open waters of the Great Lakes are "high seas," within the meaning of section 5346 of the Revised Statutes, on which the indictment in this case is founded.

That hypothesis I am unable to accept. It appears to me

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to be inconsistent with the settled meaning of the term "high seas," in our law, and in common speech, and especially as used in the Crimes Acts of the United States, as heretofore uniformly expounded by this court, and by the justices thereof.

According to all the authorities, without exception, "the high seas" denote the ocean, the common highway of all nations — sometimes as including, sometimes as excluding, bays and arms of the sea, or waters next the coast, which are within the dominion and jurisdiction of particular States — but never as extending to any waters not immediately connecting with the sea.

The first Crimes Act of the United States provided, in section 8, for the punishment of murder or other capital offence committed "upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular State;" and, in section 12, for the punishment of any person who should "commit manslaughter upon the high seas," but not mentioning in that section any other waters. Act of April 30, 1790, c. 9; 1 Stat. 113, 115. In *United States* v. *Wiltberger*, decided by this court in 1820, it was adjudged that manslaughter committed by the master upon one of the seamen, on board a merchant vessel of the United States, below low water mark of a river flowing into the sea in China, was not "manslaughter upon the high seas," nor within the act of 1790; and Chief Justice Marshall, in delivering judgment, said: "If the words be taken according to the common understanding of mankind, if they be taken in their popular and received sense, the 'high seas,' if not in all instances confined to the ocean which washes a coast, can never extend to a river about half a mile wide, and in the interior of a country." 5 Wheat. 76, 94.

In *United States* v. *Brailsford*, this court held that the words "out of the jurisdiction of any particular State," in section 8 of the act of 1790, meant a State of the Union, and not a foreign State; and that a ship lying at anchor in an open roadstead, within a marine league of a foreign shore, and not in a river, haven, basin or bay, might be found by a jury to be on the high seas. 5 Wheat. 184, 189, 200. A similar

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decision had been previously made by Mr. Justice Story. *United States* v. *Ross*, 1 Gallison, 624.

In *United States* v. *Hamilton*, Mr. Justice Story held that larceny in an enclosed dock, within the ebb and flow of the tide, in a foreign port, was not larceny "upon the high seas," under section 16 of the act of 1790. 1 Mason, 152. In *United States* v. *Morel*, it was held by Mr. Justice Baldwin and Judge Hopkinson, that an indictment on the same section was not sustained by proof of stealing in a land-locked harbor of one of the Bahama Islands; the court saying: "The open sea, the high sea, the ocean, is that which is the common highway of nations, the common domain within the body of no country, and under the particular right or jurisdiction of no sovereign, but open, free and common to all alike, as a common and equal right." 13 American Jurist, 279, 282. And in *United States* v. *Jackson*, a like decision was made by Mr. Justice Thompson and Judge Betts as to larceny in the harbor of Vera Cruz, because "the high seas were, properly speaking, within the territory of no State or country." 2 N. Y. Leg. Obs. 3, 4.

In *United States* v. *Robinson*, 4 Mason, 307, which was an indictment on the act of March 26, 1804, c. 40, (2 Stat. 290,) for destroying a vessel "on the high seas" with intent to defraud the underwriters, Mr. Justice Story held that a land-locked bay in Bermuda could not be considered as the high seas. And, under the same statute, Mr. Justice Nelson and Judge Betts held that a vessel in the East River, or western extremity of Long Island Sound, was not upon the high seas. *United States* v. *Wilson*, 3 Blatchford, 435.

The Crimes Act of March 3, 1825, c. 65, was drafted by Mr. Justice Story, to supply the defects of former acts. 1 Story's Life of Story, 297, 437, 439, 440; 2 ib. 402. That act, in sections 4, 6–8, 11 and 22, provided for the punishment of murder, of assaults with a dangerous weapon or with intent to kill, and of various other crimes, "upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay," thus covering all tide waters, including a dock or basin, or a land-locked bay, in which the tide ebbs and flows from

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the sea, though in a foreign State, if "within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State" of the Union. 4 Stat. 115–118, 122.

In *United States* v. *Grush*, 5 Mason, 290, which was an indictment on the provision of section 22 of the act of 1825, (reënacted in the very section of the Revised Statutes now in question,) for an assault with a dangerous weapon and with intent to kill, Mr. Justice Story, in deciding that a place in Boston Harbor within the body of a county was a bay or haven or arm of the sea, but was not the high seas, said: "There cannot, I think, be any doubt as to what is the true meaning of the words 'high seas' in this statute. Mr. Justice Blackstone, in his Commentaries, (1 Com. 110,) uses the words 'high sea' and 'main sea' (*altum mare*, or *le haut meer*) as synonymous; and he adds, 'that the main sea begins at the low water mark.' But though this may be one sense of the terms, to distinguish the divided empire, which the admiralty possesses between high water and low water mark, when it is full sea, from that which the common law possesses, when it is ebb sea; yet the more common sense is, to express the open, unenclosed ocean, or that portion of the sea, which is without the *fauces terræ* on the sea-coast, in contradistinction to that, which is surrounded, or enclosed between narrow headlands or promontories." And, after referring to *United States* v. *Wiltberger*, above cited, and other authorities, he concluded: "From this view of the subject, I am entirely satisfied, as well upon the language of the authorities, as the descriptive words in the context, that the words 'high seas' in this statute are used in contradistinction to arms of the sea, and bays, creeks, &c., within the narrow headlands of the coast; and comprehend only the open ocean, which washes the sea-coast, or is not included within the body of any county in any particular State." 5 Mason, 297–299.

Here we have the deliberate opinion of Mr. Justice Story, who had drafted the act, who had taken part in all the previous decisions of this court upon the subject, and who had often considered it at the circuit, that the words "high seas" in the very enactment now before us "comprehend only the

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open ocean, which washes the sea-coast, or is not included within the body of any county in any particular State."

So Chancellor Kent says: "The high seas mean the waters of the ocean without the boundary of any county, and they are within the exclusive jurisdiction of the admiralty up to high water mark when the tide is full. The open ocean which washes the sea-coast is used in contradistinction to arms of the the sea enclosed within the *fauces terræ*, or narrow headlands and promontories: and under this head are included rivers, harbors, creeks, basins, bays, &c., where the tide ebbs and flows." 1 Kent Com. 367.

If we turn to the principal American dictionaries, we find the following definitions of "high seas": In Worcester, "*high seas*, the open ocean." In Webster, "*high seas*, (*law*) the open sea; the part of the ocean not in the territorial waters of any particular sovereignty, usually distant three miles or more from the coast line." In the Century Dictionary, "*high seas*" are defined as "the open sea or ocean; the highway of waters;" and, in law, either (1) the waters of the ocean to high water mark, or (2) those "not within the territorial jurisdiction of any nation, but the free highway of all nations, the waters of the ocean exterior to a line parallel to the general direction of the shore and distant a marine league therefrom;" and it is added: "The Great Lakes are not deemed high seas."

A fortnight after the passage of the act of 1825, this court, speaking by Mr. Justice Story, decided that the general admiralty jurisdiction of the courts of the United States was limited to tide waters. *The Thomas Jefferson*, 10 Wheat. 428. That decision was followed in 1833 in *Peyroux* v. *Howard*, 7 Pet. 324, in 1837 in *The Orleans*, 11 Pet. 175, and in 1847 in *Waring* v. *Clarke*, 5 How. 441. For more than half a century after the adoption of the Constitution, Congress took no step towards extending the admiralty jurisdiction beyond such waters. In the act of February 26, 1845, c. 20, extending that jurisdiction, in matters of contract and tort, "upon the lakes and the navigable waters connecting the same," Congress clearly treated those lakes and waters as distinct from, and not included within, "the high seas or tide waters." 5 Stat. 726.

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And Congress never indicated any intention to extend the criminal jurisdiction of the courts of the United States "to the Great Lakes and the connecting waters" until three years after the assault alleged in the indictment in this case. Act of September 4, 1890, c. 874; 26 Stat. 424.

The judgment of this court in 1851, in *The Genesee Chief*, 12 How. 443, overruling *The Thomas Jefferson* and the cases which followed it, and holding the act of 1845 to be constitutional, did not proceed upon any assumption that the Great Lakes were "high seas;" but upon the broad ground that "the lakes and the waters connecting them are undoubtedly public waters," and therefore "within the grant of admiralty jurisdiction in the Constitution of the United States." 12 How. 457. Chief Justice Taney, in delivering that judgment, clearly distinguished the Great Lakes from the high seas. This appears in his statement of the question whether "the admiralty jurisdiction, in matters of contract and tort, which the courts of the United States may lawfully exercise on the high seas, can be extended to the lakes, under the power to regulate commerce;" as well as in his pregnant observations, "These lakes are, in truth, inland seas. Different States border on them on one side, and a foreign nation on the other." 12 How. 452, 453.

So in *The Eagle*, 8 Wall. 15, in which it was decided that the admiralty jurisdiction over all navigable waters, having been declared in *The Genesee Chief* to depend upon the Constitution, and not upon any act of Congress, extended to the British side of the Detroit River, Mr. Justice Nelson, speaking for this court, observed the same distinction, saying that the District Courts could take cognizance of "all civil causes of admiralty jurisdiction upon the lakes and waters connecting them, the same as upon the high seas, bays, and rivers navigable from the sea." 8 Wall. 21.

The lakes are not high seas, for the very reason that they are inland seas, within the exclusive jurisdiction and control of those countries within whose territories they lie, or between whose territories they are the boundary; and therein essentially differ from "the high seas, where the law of no particu-

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lar State has exclusive force, but all are equal." Bradley, J., in *The Scotland*, 105 U. S. 24, 29.

The distinction is familiar and well established in international law.

As was said by Sir William Scott: "In the sea, out of the reach of cannon shot, universal use is presumed; in rivers flowing through conterminous States, a common use to the different States is presumed." *The Twee Gebroeders*, 3 C. Rob. 336, 339.

In a case in which a municipal seizure under the Customs Act of March 2, 1799, c. 22, § 29, (1 Stat. 649,) in the St. Mary's River, then forming the boundary between the United States and the Spanish territory, of a vessel bound up that river to the Spanish waters and Spanish possessions, was held unlawful, Mr. Justice Story, speaking for this court, said that, "upon the general principles of the law of nations, the waters of the whole river must be considered as common to both nations, for all purposes of navigation, as a common highway, necessary for the advantageous use of its own territorial rights and possessions;" and he distinguished the waters of the river, common to the two nations between whose dominions it flowed, from "the ocean, the common highway of all nations." *The Apollon*, 9 Wheat. 362, 369, 371.

Vattel says: "The open sea is not of a nature to be possessed, no one being able to settle there so as to hinder others from passing over it." Vattel, lib. 1, c. 23, § 280. "No nation, therefore, has the right to take possession of the open sea, or to claim the sole use of it, to the exclusion of other nations." § 281. "Every lake, entirely included in a country, belongs to the nation owning the country, which in possessing itself of a territory is considered as having appropriated to itself everything included in it; and, as it seldom happens that the property of a lake of considerable size falls to individuals, it remains common to the nation. If this lake is situated between two States, it is presumed to be divided between them at the middle, so long as there is neither title, nor constant and manifest custom, to determine otherwise." c. 22, § 274.

Wheaton says: "The sea cannot become the exclusive prop-

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erty of any nation. And consequently the use of the sea, for these purposes," (navigation, commerce, and fisheries,) "remains open and common to all mankind." Wheaton's International Law, (8th ed.,) § 187. "The territory of the State includes the lakes, seas and rivers, entirely enclosed within its limits. The rivers which flow through the territory also form a part of the domain, from their sources to their mouths, or as far as they flow within the territory, including the bays or estuaries formed by their junction with the sea. Where a navigable river forms the boundary of conterminous States, the middle of the channel is generally taken as the line of separation between the two States, the presumption of law being that the right of navigation is common to both; but this presumption may be destroyed by actual proof of prior occupancy and long undisturbed possession, giving to one of the riparian proprietors the exclusive title to the entire river." § 192.

Phillimore, after observing that "no difficulty can arise with respect to rivers and lakes entirely enclosed within the limits of a State," and discussing the rights in rivers which flow through more than one State, and the rights in the open sea, in narrow seas or straits, and in portions of the sea next the coast or between headlands, says: "With respect to seas entirely enclosed by the land, so as to constitute a salt-water lake, the general presumption of law is, that they belong to the surrounding territory or territories in as full and complete a manner as a fresh-water lake. The Caspian and the Black Sea naturally belong to this class." And he proceeds to show that the rights of other nations than Turkey and Russia to navigate the Black Sea from the Mediterranean rest upon treaties only. 1 Phillimore's International Law, (3d ed.) c. 5, § 155; c. 8, §§ 205, 205A. See also Wheaton, § 182 and note; Treaty of 1862 of the United States with the Ottoman Empire, art. 11, 12 Stat. 1216.

The Mediterranean Sea, opening directly into the Atlantic Ocean at the Straits of Gibraltar, and washing the shores of many countries of different sovereigns, has, excepting such portions thereof as the Gulf of Venice or the Straits of Mes-

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sina, been recognized and considered by all nations for centuries as part of the high seas, free to all mankind. Martens, Précis du Droit des Gens, § 42; Wheaton, § 190. And it was the one sea familiarly known to the ancients as *altum mare*, the deep sea or "high sea," or simply *altum*, the deep.

The freedom of the Baltic Sea, and of the Sound connecting it with the North Sea, long and earnestly controverted, was finally established in 1857 by a treaty of the five powers whose territories bordered thereon with other European nations, and by a separate treaty between the United States and Denmark. Wheaton, §§ 183–185, 187 note; 1 Phillimore, c. 5, § 179; c. 8, § 206; 11 Stat. 719.

As to the Great Lakes of North America, there has never been any doubt. They are in the heart of the continent, far above the flow of the tide from the sea. Lake Michigan is wholly within the limits and dominion of the United States, and of those States of the Union which surround it. *Illinois Central Railroad* v. *Illinois*, 146 U. S. 387; 6 Opinions of Attorneys General, 172. The middle line of Lakes Superior, Huron, Erie and Ontario, and of the waters connecting them, forms part of the boundary between the United States and the State of Michigan and other States of the Union, on the one hand, and the British possessions in Canada, on the other. Treaties of Paris in 1783, art. 2, and of Ghent in 1814, art. 6, and Decision of Commissioners under this article; 8 Stat. 81, 221, 274; Charters and Constitutions, 994, 1453, 2026. No other nation has the right to navigate them, except by the permission, and subject to the laws, of the United States and Great Britain, respectively. The controversy between the United States and Great Britain as to the right of navigating the river St. Lawrence turned upon the effect to be given to the fact that one side of the Great Lakes and of the waters connecting them belonged to each country, as against the fact that both shores of the St. Lawrence below belonged to Great Britain; and it was never suggested that any third nation had a free and common right of navigation of the lakes and their connecting waters. On the contrary, the exclusive right of the United States and Great Britain to navigate the lakes was

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made the basis of the American claim to the navigation of the river. On June 19, 1826, Mr. Clay, Secretary of State under President John Quincy Adams, in a letter to Mr. Gallatin, then Minister to England, said: "The United States and Great Britain have, between them, the exclusive right of navigating the lakes. The St. Lawrence connects them with the ocean. The right to navigate both (the lakes and the ocean) includes that of passing from the one to the other through the natural link." Congressional Documents, 1827–28, No. 43, p. 19; Wheaton, § 205. The right of citizens of the United States to navigate the St. Lawrence, as well as a right to British subjects to navigate Lake Michigan, was secured by treaties between the two countries in 1854 and 1871. 10 Stat. 1091; 17 Stat. 872. See also Act of July 26, 1892, c. 248, 27 Stat. 267; 1 Wharton's International Law Digest, §§ 30, 31.

No instance has been produced, in which the words "high seas" have been used to designate fresh inland waters, the entire jurisdiction and control of which belong to those nations within whose territories they lie, or between whose territories they form the boundary.

The conclusion seems to me inevitable that no part of the Great Lakes can be held to be "high seas," within the meaning of section 5346 of the Revised Statutes.

The language of this section, immediately following the term "the high seas," is "or in any arm of the sea, or in any river, haven, creek, basin or bay." It is quite clear that the Detroit River is not an "arm of the sea," or a "haven, creek, basin or bay." Is it a "river," within the meaning of this enactment?

Upon this point I agree with the rest of the court that the language used must be read in conjunction with the term "the high seas," and as referring to waters connecting with the high seas mentioned; and that Congress cannot be supposed to have intended to include fresh-water rivers, and not to include the lakes from or into which they flow, and which, together with them, form a continuous passage for vessels. But if the lakes are not "high seas," nor included in the act, the consequence would seem to be that the word "river" cannot be held to include a river connecting two of the lakes.

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The question now before the court is not one, arising in a civil proceeding, of the extent of the general and comprehensive grant in the Constitution of "admiralty and maritime jurisdiction" to the courts of the United States. But it is a question, arising in a criminal prosecution, of the construction of particular words in a penal statute, which cannot be extended by the court to a similar or analogous case, not within their natural and obvious meaning.

The place in the Detroit River within the territorial limits of the Dominion of Canada, where this offence is alleged to have been committed, was doubtless "within the admiralty jurisdiction of the United States," under the decision in *The Genesee Chief;* and was "out of the jurisdiction of any particular State," under the decision in *United States* v. *Bradsford*, 5 Wheat. 184, 189, 200, already cited. Nor is there any doubt of the power of Congress to punish crimes committed on American vessels, wherever they may be afloat. *United States* v. *Furlong*, 5 Wheat. 184, 194; *Crapo* v. *Kelly*, 16 Wall. 610, 624–626.

But, in order to come within the statute, it is not enough that the offence was committed "within the admiralty jurisdiction of the United States;" and "out of the jurisdiction of any particular State" of the Union; and upon a vessel belonging in whole or in part to the United States, or to a citizen thereof. It must also be covered by the description, "upon the high seas, or upon any arm of the sea, or in any river, haven, creek, basin or bay."

The leading words of this description are applicable to nothing but the ocean and its adjacent waters within the ebb and flow of the tide; every word in the description aptly designates tide waters; all the words, taken together, point to tide waters; and no other waters come within their natural and obvious meaning, in the connection in which they are used. The evident intention of Congress, to be collected from the words it employed, was to punish offences upon the sea, and upon any waters forming part of the sea, or immediately connecting with it, as far as high water mark, and not within the jurisdiction of any State of the Union; and the whole object

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and effect of adding, after the "high seas," the words "or in any arm of the sea, or in any river, haven, creek, basin or bay," were to cure the defects of earlier statutes in this respect, and to include all waters within the ebb and flow of the tide, which are estuaries or approaches of the high seas or open ocean.

Upon this part of the case, the decision of this court in *United States* v. *Bevans*, 3 Wheat. 336, is much in point. That was an indictment for a murder committed by a marine upon another enlisted man on a ship of war of the United States lying in the harbor of Boston, and so within the territorial jurisdiction of the State of Massachusetts, and therefore, as the court held, not coming within the description in section 8 of the act of April 30, 1790, c. 9, "upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular State." But the jurisdiction of the Circuit Court of the United States was also sought to be maintained under the provision of section 7 of the same act, for the punishment of murder committed "within any fort, arsenal, dockyard, magazine, or other place or district of country, under the sole and exclusive jurisdiction of the United States." 1 Stat. 113. It was argued that a ship of war of the United States was "a place under the sole and exclusive jurisdiction of the United States," and therefore within the act. But this court, speaking by Chief Justice Marshall, held otherwise; and, while waiving a decision of the question whether any court of Massachusetts would have jurisdiction of the offence; and recognizing as unquestionable the power of Congress to punish an offence committed by a marine on board a ship of war, wherever she may be; nevertheless held that Congress had not exercised that power by the provision last quoted, because the objects with which the word "place" was associated — "fort, arsenal, dockyard, magazine," and "district of country" — being all fixed and territorial in their character, "the construction seems irresistible that, by the words 'other place' was intended another place of a similar character with those previously enumerated, and with that which follows," and "the context shows the mind of the legislature

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to have been fixed on territorial objects of a similar character." 3 Wheat. 390, 391.

Applying the same rule of construction, *noscitur a sociis*, to the enactment now before the court, the conclusion seems irresistible that, as the preceding words, "upon the high seas, or in any arm of the sea," as well as the succeeding words, "haven, creek, basin or bay," designate tide waters of or adjoining the ocean, the words "any river" must be held to designate waters of a similar character, that is to say, those rivers only where the tide ebbs and flows, and which are immediately connected with the sea or with one of the other waters enumerated, and cannot be extended to a fresh-water river in the interior of the continent, because the context shows the mind of the legislature to have been fixed on tide waters.

Should there be any doubt of the soundness of this construction, that doubt, in interpreting a penal statute, should be solved in favor of the defendant.

In *United States* v. *Wiltberger*, cited at the beginning of this opinion, in which, as in *United States* v. *Bevans*, just cited, and in the case at bar, the question was of the meaning of words, not defining the elements of the crime itself, but only describing the place of its commission, Chief Justice Marshall expounded the rule of construction of penal statutes as follows: "The rule, that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment." "Though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ." "To determine that a case is within the intention of a statute,

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its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated." 5 Wheat. 95, 96. And in answer to the suggestion made in that case (which has been repeated in this) of "the extreme improbability that Congress could have intended to make those differences with respect to place, which their words import," the Chief Justice said: "We admit that it is extremely improbable. But probability is not a guide which a court, in construing a penal statute, can safely take. We can conceive no reason why other crimes, which are not comprehended in this act, should not be punished. But Congress has not made them punishable, and this court cannot enlarge the statute." 5 Wheat. 105.

For these reasons, with all deference to the opinion of my brethren, I am constrained to conclude that the question certified should be answered in the negative.

Mr. Justice Brown dissenting.

I am also constrained to dissent from the opinion of the court in this case, which appears to me to inaugurate a wholly new departure in the direction of extending the jurisdiction of the Federal courts. It is a matter of regret to me that this departure should be made in a case in which the defendant was represented neither by brief nor oral argument — a fact which suggests, at least, an unusual degree of caution in dealing with the question involved.

I had supposed that, in criminal cases, the accused was entitled to the benefit of any reasonable doubt, not only with regard to the evidence of guilt, but with regard to the jurisdiction of the court; in other words, that penal statutes should be construed strictly; and that the facts that the Supreme Court of Michigan, in a very carefully considered case some thirty years ago, *People* v. *Tyler*, 7 Michigan, 161, had decided that the criminal jurisdiction of the Federal courts did not

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extend to the lakes; that the same question had been decided the same way by Judge Wilkins in *Miller's case*, Brown's Adm. 156; that the Federal courts upon the lakes had uniformally acquiesced in these decisions; and that no case is reported to the contrary, would of itself make a case of reasonable doubt, to the benefit of which the prisoner would be entitled.

I fully concur in all that has been stated in the opinion of the court with regard to the magnitude of the commerce upon the lakes; and if that question were pertinent here, it would doubtless be controlling. Having lived for thirty years within sight of this commerce, it would ill become me to depreciate its importance; but it occurs to me that if this were a consideration at all it would be equally applicable to our jurisdiction over the Hudson, the Ohio, and the Mississippi, upon all of which the commerce is of great magnitude. I had assumed that the question at issue involved simply the construction of a statute, and not the magnitude of the commerce upon the lakes.

My own views on this question were so fully set forth in the case of *Byers*, 32 Fed. Rep. 404, that I can add but little to what was there said. Revised Statutes, § 5346, under which this indictment was framed, limits the jurisdiction of the District Court to "cases arising upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay within the admiralty jurisdiction of the United States, *and out of the jurisdiction of any particular State.*"

The first question which arises, then, is as to whether the lakes are "high seas," and as to that I had supposed, until reading the opinion of the court in this case, there could be but one answer.

The term "high seas" has never been regarded by any public writer or held by any court to be applicable to *territorial* waters, and, like the word "highways," presupposes the right of the public to make free use of them, and excludes the idea of private ownership. Of the sea, Lord Hale says (*De Jure Maris*, chapter 4): "The sea is either that which lies within the body of the county or without. That arm or branch of the sea which lies within the *fauces terræ*, where

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a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county, and therefore within the jurisdiction of the sheriff or coroner. The part of the sea which lies not within the body of a county, is called the main sea or ocean."

Azuni, an Italian publicist of the last century, in writing of the maritime law of Europe, says (Part 1, chapter 1, section 12): "The sea belongs to no one; it is the property of all men; all have the same equal right to its use as to the air they breathe, and to the sun that warms them. Seas are the great highways traced by nature between the different parts of the world, to facilitate and expedite communication between the various nations who inhabit it. If a nation seizes on these highways, if it arrogates to itself the exclusive privilege of traversing them without opposition, and repels, by the fear of being plundered, all those who wish to make the same use of them, it is no better than a nation of robbers." Section 14: "The liberty of navigation and of fishing is derived from natural law, and the law of nations, as well as from the civil law. For these reasons, the high seas ought to remain as common to the human race as air and light. The use of those elements, unquestionably, can never belong to any one nation, to the exclusion of others." Section 15: "From these principles, it follows, that the right of prior occupancy cannot give to a nation the absolute empire of the high sea, and for the reason already mentioned, that this element is not susceptible of individual appropriation."

Valin, in his commentary on the Marine Ordinance, observes: "For in short the ocean belongs to no one, and the conclusion undoubtedly to be drawn from this is that all nations are permitted to navigate it."

So Vattel, in speaking of the sea (Book 1, chapter 23, section 281): "But this," speaking of private property, "is not the case with the open sea, on which people may sail and fish without the least prejudice to any person whatsoever, and without putting any one in danger. No nation, therefore, has a right to take possession of the open sea, or claim the sole use of it, to the exclusion of other nations. . . . Nay,

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more, a nation, which, without a legitimate claim, would arrogate to itself an exclusive right to the sea, and support its pretensions by force, does an injury to all nations; it infringes their common right; and they are justifiable in forming a general combination against it, in order to repress such an attempt."

So Chancellor Kent, in speaking of jurisdiction over the seas, Part 1, Lecture 2, says: "The open sea is not capable of being possessed as private property. The free use of the ocean for navigation and fishing is common to all mankind, and the public jurists generally and explicitly deny that the main ocean can ever be appropriated. The subjects of all nations meet there, in times of peace, on a footing of entire equality and independence. No nation has any right or jurisdiction at sea, except it be over the persons of its own subjects in its own public and private vessels." 1 Kent Com. 26.

From time immemorial the term "high seas" has been used to import the unenclosed and open ocean without the *fauces terræ*. In *United States* v. *Bevans*, 3 Wheat. 336, a homicide had been committed upon an American man-of-war lying at anchor in the main channel of Boston harbor, to which there is at all times a free and unobstructed passage to the open ocean. The language of the statute was practically the same as in this case; but it was held by this court, speaking through Chief Justice Marshall, that to bring the defendants within the jurisdiction of the courts of the Union the murder must have been committed in a river, etc., *out of the jurisdiction of any State*, and that as the jurisdiction of a State was coextensive with its territory and with its legislative power, the courts of Massachusetts had exclusive jurisdiction of the crime. It was further held that whatever might be the constitutional power of Congress, it was clear that this power had not been exercised so as to confer upon its courts jurisdiction over any offences committed within the jurisdiction of any particular State. In *United States* v. *Wiltberger*, 5 Wheat. 76, it was held that the courts of the United States had no jurisdiction of a manslaughter committed on a merchant vessel of the United States lying in the river Tigris, in the Empire of China. It

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was held in this case that the homicide was not committed on the "high seas."

In *United States* v. *Jackalow*, 1 Black, 484, it was said by this court that to give a Circuit Court of the United States jurisdiction of an offence not committed within its district, it must appear that the offence was committed *out of the jurisdiction of any State*, and not within any other district of the United States. This was applied to an offence committed in Long Island Sound, one and a half miles from the Connecticut shore at low water mark.

So in *Miller's case*, 1 Brown's Adm. 156, it was held by Judge Wilkins of Michigan that while it was within the constitutional competency of Congress to define and punish offences when committed upon other waters than the high seas, it had not done so, and that Lake Erie was not a part of the high seas. This was applied to a shocking case of an attempt to burn a passenger steamer upon Lake Erie.

But it seems to me, without going further into the authorities, that the term "high seas" is accurately defined by the statute under which this indictment is framed as "waters within the admiralty and maritime jurisdiction of the United States and out *of the jurisdiction of any particular State*."

The underlying error of the opinion of the court in this case appears to me to consist in a total ignoring of the last qualification. That the term "high seas" extends to what are known as the great oceans of the world there can be no doubt. I presume it also extends to the Mediterranean Sea, for the reason that, bordering so many nations as it does, a division of the waters between these nations would be impracticable. Whether, as stated in the opinion of the court, the term also extends to the Black Sea, there seems to be grave doubt; but if it does, it is because the waters of the Black Sea are not proprietary waters, are not claimed by Russia or Turkey as being a part of their territory. The very idea of giving to the courts of all nations jurisdiction over the high seas arises primarily from the fact that they belong to no particular sovereignty. If it be true that the lakes are high seas, it logically follows that any European power may punish a crime com-

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mitted upon the lakes in their own courts, whenever it is able to lay hands upon the offender. It would also follow that other nations than England and America would have the right to navigate these seas without any local restrictions, and even to send their fleets there and perhaps to engage in hostilities upon its waters. In the case of *The Genessee Chief*, 12 How. 443, this court did not hold that the lakes were high seas, but that the limitation of the admiralty jurisdiction in civil cases to tide waters did not apply to this country, or to the interior lakes, a doctrine in which I fully concur, and one that has met with the practically unanimous approval of the profession.

The difficulty of applying the term "high seas" to the lakes arises not from the fact that they are not large enough, that the commerce which vexes their waters is not of sufficient importance, but from the fact that they are within the local jurisdiction of the States bordering upon them. By the treaty of peace between this country and Great Britain, of 1783, the boundary line between the United States and Canada was fixed in the middle of Lake Ontario, Niagara River, Lake Erie, Detroit River, Lake Huron, St. Mary's River, and Lake Superior, and by the treaty of 1814 this line was recognized and subsequently designated by commissioners appointed for that purpose. So in the acts admitting Illinois, Wisconsin, and Michigan into the Union the boundary lines of these States were fixed at the middle of Lake Michigan, and as to the State of Michigan at the boundary line between the United States and Canada. Acting upon this theory, the State of Michigan has assumed jurisdiction of all crimes committed upon her side of the boundary line, and provided for their punishment in certain counties irrespective of the question whether the crimes were committed within the limits of a particular county.

But even if the lakes were to be considered as high seas, that term surely cannot be applied to a river twenty-two miles in length and less than a mile in width, connecting the two lakes.

The further question then arises whether the locality in

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question is covered by the words "in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty jurisdiction of the United States and out of the jurisdiction of any particular State." As the western half of the Detroit and St. Clair rivers is within the territorial jurisdiction of Michigan, it only remains to consider whether the fact that the eastern half of these rivers is within the territorial jurisdiction of Canada meets the requirements of the statute. I may say that this question was elaborately considered by the Supreme Court of Michigan in the case of *People* v. *Tyler*, 7 Michigan, 161, which was also the case of an assault committed on the Canadian side of the boundary line, in which the Federal court, without an investigation of the question, had convicted Tyler. The Supreme Court of Michigan were unanimous in the opinion that the jurisdiction did not exist. Separate opinions were delivered by three of the judges, in which every possible case bearing upon the question was cited and criticised. I have no doubt whatever of the power of Congress to extend its jurisdiction to crimes committed upon navigable waters. Indeed, since the decision in *Byers' case*, and on September 4, 1890, Congress did pass an act providing for the punishment of crimes committed anywhere upon the lakes. 26 Stat. 424, c. 874. 1 Supp. Rev. Stat. 799.

But, considering that, at the time the act of Congress in question was passed, viz., in 1790, the lakes were far beyond the bounds of civilization and possessed no commerce, except such as was carried on in canoes, it seems impossible to say that Congress intended that the words "arm of the sea, or river, haven, creek, basin, or bay" could have been intended to apply to the lakes when the word "lakes" might just as well have been used, had the interior waters of the country been included. It seems to me entirely clear that the words alluded to, following immediately the words "high seas," apply only to such waters as are connected immediately with the high seas, and have no application to the Great Lakes. This was evidently the view taken by Congress in the enactment of 1890.

I may add in this connection that the act of 1790, under

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which this indictment was framed, was before Congress at the time of the passage of the Crimes Act of 1825, and also at the time of the adoption of the Revised Statutes, and no effort was made to change the language of the act by inserting the word "lakes," and no such change was ever made until after the offence in this case had been committed.

The conclusion seems to me irresistible that, considering the words high seas are followed by the words "in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty jurisdiction of the United States and out of the jurisdiction of any particular State," they should be limited to such waters as are directly connected with the high seas. It is incredible that if Congress had intended to include the lakes in either of these acts it would have drawn a line through the centre, and given to the Federal courts jurisdiction upon one side of that line, and not upon the other, when it was equally within its competency to confer full jurisdiction over all crimes committed upon American vessels upon the entire lakes. Especially is this true in view of the fact that it is often impossible to locate the ship at the time the crime is committed upon one side or the other of the boundary line.

It is beyond question in this case that the crime charged was committed within the waters of the Province of Ontario; that the courts of such Province had jurisdiction of the cause, and in my opinion such jurisdiction was exclusive.

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UNITED STATES TRUST COMPANY v. WABASH WESTERN RAILWAY COMPANY.

WABASH WESTERN RAILWAY COMPANY v. UNITED STATES TRUST COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Nos. 51, 57. Argued October 23, 24, 1893. — Decided November 20, 1893.

On the 10th of February, 1879, the Council Bluffs and St. Louis Railway Company leased their projected railway from Council Bluffs to the state line to the St. Louis, Kansas City and Northern Railway Company for the term of 91 years. Together the lines formed the Omaha Division of the Wabash system. On the 15th of February, 1879, the lessee issued bonds to the amount of $2,350,000, secured by a mortgage to the United States Trust Company, to complete and equip the division. In November, 1879, the lessee was consolidated with the Wabash Railway Company, under the name of the Wabash, St. Louis and Pacific Railway Company. The new corporation assumed all the obligations of the old ones, entered into possession of all the property, issued bonds to the amount of $17,000,000, secured by a general mortgage to the Central Trust Company, and other bonds, and continued to operate the property down to May, 1884, when it filed a bill alleging its own insolvency, and asking the court to appoint receivers of all its property, which was done. A preferential indebtedness was recognized by the court to the extent of $4,378,233.49, which the receivers were directed to pay. The rentals and interest amounted to $2,175,062, of which $82,250 was for the rent of the Omaha Division. These also were ordered to be paid by the receivers. It turned out, practically, that so far from being able to make all these payments out of earnings, they were never enough to pay the preferential debts, and that the Omaha Division was operated at an actual loss, without taking the rental into account. These facts were made known to the court by the receivers in March, 1885, whereupon it ordered, in April, 1885, that the subdivisional accounts be kept separately, and that no rent or subdivisional interest be paid where a subdivision earned no surplus. It also ordered the preferential debts to be paid before rentals. The instalment of rent or interest on the Omaha Division due in April, 1885, not being paid, a bill was filed to foreclose the mortgage upon it, and when a default took place in the payments due in October, 1885, a receiver was asked for. In the following March a receiver was appointed

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Syllabus.

as asked for, and the Omaha Division was surrendered to him by the general receivers of the Wabash system. He intervened in the Wabash suit, praying for payment by the general receivers of the overdue rent on the Omaha Division, amounting to $222,075.77. A decree of foreclosure and sale of the Wabash system, under the general mortgage, was entered, which reserved specially all rights under the Omaha Division, and under this decree a sale was made and the property was transferred to a new corporation called the Wabash Western Railway Company. The petition for the payment of rent of the Omaha Division, after reference to a master and report by him, resulted in a decree for the payment of one month's rent with interest, instead of 16 months, as prayed for. *Held*,

(1) That the court was bound to take into consideration the peculiar circumstances under which the receivers took possession of and operated the Wabash system;

(2) That, following *Quincy, Missouri &c. Railroad* v. *Humphreys*, 145 U. S. 82, the court did not bind itself or its receivers to pay the agreed rent *eo instanti* by the mere act of taking possession, but that reasonable time had to be taken to ascertain the situation of affairs;

(3) That the order made by the court below to pay the rents only after the discharge of the preferential debts was correct;

(4) That the owners of the Omaha branch, or the trustees of its mortgage, knowing that that branch was in the hands of the general receivers, might have intervened in that suit for the protection of their property, and were bound by the order for payment of the preferential debts; as it is settled that whenever, in the course of a receivership, the court makes an order which the parties to the suit consider injurious to their interests, it is their duty to file a motion at once asking the court to cancel or to modify it;

(5) That the petition of the receivers of March, 1885, and the order of the court thereupon touching subdivision earnings, was notice to the branch lines that they must not expect payment of their rent, when the subdivision earned nothing beyond operating expenses;

(6) That as the mortgage to the United States Trust Company did not convey the income or earnings of the road to it, but only authorized it to take possession in case of default, the trustee could only secure the earnings by taking possession in such case;

(7) That until the mortgagee asserted its rights under the mortgage to the possession of the road by filing a bill of foreclosure and by demanding possession, it had no right to receive the earnings and profits;

(8) That the judgment of the court below, awarding a recovery of only one month's rent, was right.

The general rule applicable to this class of cases is, that an assignee or receiver is not bound to adopt the contracts, accept the leases, or other-

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wise step into the shoes of his assignor, if, in his opinion, it would be unprofitable or undesirable to do so.

In such case a receiver is entitled to a reasonable time in which to elect whether he will adopt or repudiate such contracts.

If a receiver in a suit for foreclosing a railway mortgage elects to adopt a lease, he becomes vested with the title to the leasehold interest, and a priority of estate is thereby created between the lessor and the receiver, by which the latter becomes liable upon the covenant to pay rent.

THESE were cross appeals from a final decree entered September 25, 1889, overruling the exceptions of the appellant, the United States Trust Company, to a master's report, overruling in part the exceptions of the appellant, the Wabash Western Railway Company, to the same report, and adjudging that the Trust Company, as trustee under the mortgage of what is known as the Omaha Division of the Wabash, St. Louis and Pacific Railway, recover from the Wabash Western Railway Company the sum of $13,708.33, with interest thereon from January 6, 1886, amounting in all to $16,765.51, as rental for that division during the period in which it was operated by the receivers of the Wabash Company.

At the time the petition in this case was filed, the Wabash, St. Louis and Pacific Railway Company, a corporation formed by the consolidation of a large number of railway companies, extending from Detroit and Toledo in the East to Omaha and Kansas City in the West, with a total mileage of 3600 miles, of which railway the St. Louis, Kansas City and Northern Railway was a branch, was in process of winding up and reorganizing under two bills, namely: 1. A bill filed May 27, 1884, by the Wabash, St. Louis and Pacific Railway Company itself, wherein it set forth its own insolvency, its inability to meet various pressing debts, including interest due June 1, 1884, on its general mortgage and certain other of its bonds; the consequent danger of a breaking up of its system of railroads, and the irreparable damage that might result from its disruption, and praying for the appointment of receivers to take possession of, preserve, and operate its lines of railroad for the benefit of its creditors, according to their respective legal and equitable rights. To this bill the Central Trust Company of New York and James Cheney, trustees under the Wabash

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general mortgage; the United States Trust Company of New York, trustee of the Omaha Division mortgage, as well as the trustees in all the underlying and divisional mortgages on the various lines of the Wabash system, were made defendants. 2. A cross-bill filed June 9, 1884, by the trustees of the Wabash Company, under its general mortgage, for the foreclosure of that mortgage and appointment of receivers of the mortgaged premises.

The petition in this case was filed April 23, 1886, and the case referred to a master upon a stipulation as to the facts, of which the following is a summary: On February 10, 1879, the Council Bluffs and St. Louis Railway Company, an Iowa corporation, the owner of a projected railway sixty-five miles in length from Council Bluffs, Iowa, in a southeasterly direction to a point on the state line between Iowa and Missouri, leased its road to the St. Louis, Kansas City and Northern Railway Company, the owner of another railway extending from that point on the state line about seventy-eight miles to Pattonsburg, Missouri, for the term of ninety-one years. These roads formed a line from Pattonsburg, Missouri, to Council Bluffs, Iowa, and are known in this litigation as the Omaha Division of the Wabash system. On the 15th day of February, 1879, the said St. Louis, Kansas City and Northern Railway Company, for the purpose of raising funds necessary to complete and equip the Omaha Division, issued and sold $2,350,000 in bonds, or at the rate of $16,000 for each mile, and to secure the payment thereof mortgaged its interest and estate in the whole of such division, being an estate in fee in that portion of the line situated in Missouri and its leasehold estate in that part located in Iowa, to the United States Trust Company.

In November, 1879, the St. Louis, Kansas City and Northern Railway Company of Missouri was consolidated with the Wabash Railway Company, under the corporate name of the Wabash, St. Louis and Pacific Railway Company. By the terms of such consolidation the new corporation assumed all the obligations of both the constituent companies. Immediately upon such consolidation the Wabash, St. Louis and Pacific Railway Company entered upon the sole use of the

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premises demised by said lease, and on June 1, 1880, issued $17,000,000 of what were known as its general mortgage bonds, secured by a mortgage to the Central Trust Company of New York and James Cheney as trustees. This mortgage covered all its railway, leasehold, and other property. By a later mortgage, dated May 1, 1883, to the Mercantile Trust Company of New York, 11,089 shares of stock of the Council Bluffs and St. Louis Railway Company were pledged with a large amount of other property to secure $10,000,000 of what were called the collateral trust bonds of the Wabash Company.

From 1879 to May 27, 1884, the Omaha Division was successfully and profitably operated, and the terms of the lease were complied with. Upon presentation to the court of the first bill above stated, filed by the Wabash Company, alleging its own insolvency, and on May 27, 1884, an order was entered appointing Solon Humphreys and Thomas E. Tutt receivers of all the property of the said Wabash Company. This order appointing the receivers directed them to take possession of, operate, and preserve all of said lines of railroad, and from their earnings pay their operating expenses; the balance due to other railroad and transportation companies growing out of the interchange of traffic during the preceding six months; all rentals accrued, or which should thereafter accrue, on all leased lines for the use of terminals or track facilities; and for all rentals due or to become due upon rolling stock theretofore purchased by the company and partially paid for; likewise, all just claims and accounts for labor, supplies, professional services, salaries of officers, and employés that had been earned or matured during the preceding six months. The receivers were also directed by the order to keep such accounts as might be necessary to show the sources from which all such incomes and revenues were derived, with reference to the interest of all parties to the suit and the expenditures made by them.

On June 26, 1884, within one month after their appointment, the receivers made a report and petition to the court, in which they stated to the best of their information and belief that each and all of certain lines of railroad constituting the

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consolidated Wabash, St. Louis and Pacific Railway Company had "at all times during the five years last past, or ever since their construction, earned more than enough to pay their operating expenses, the cost of maintenance, and interest upon the several series of bonds" that were secured upon them by their mortgages or deeds of trust, and prayed the court to instruct them as to what they should do with respect to the payment of interest, as the same from time to time matured, on the mortgage bonds on the several lines and divisions of the road as they existed at and before the date of the consolidation. On June 28, two days after the filing of this petition, the court ordered the receivers, from the incoming rents and profits of the property, after meeting such other obligations as they had been directed to discharge by former orders, to pay from whatever balance might remain in their hands the interest maturing upon the bonds or other mortgage obligations on the several lines or divisions of the Wabash Company before its consolidation. Under this order the rental for the use of the Omaha Division, falling due on October 1, 1884, and amounting to $82,250, was paid by the receivers. Rentals and interest on other lines accruing for the same and various subsequent periods, and aggregating $2,175,062, were paid under the same order.

The record shows that at the time the receivers were appointed the labor and supply claims and other preferential indebtedness of the Wabash Company, which the receivers were, by their order of appointment, directed to pay, amounted to $4,378,233.49. It also appeared that the net earnings of all the lines operated by the receivers were never sufficient to discharge the preferential debts.

On March 20, 1885, the receivers made another application to the court, in which they set forth in detail the earnings and expenses of the various lines of the system up to November 30, 1884, and prayed the court for instruction with respect to the future operation by them of the several branch lines that had failed to earn their operating expenses. Notice was given to the solicitor of the trustee of the Omaha Division that this petition would be called up on the 14th of April. In the

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application it was stated that the expenses of operating the Council Bluffs and St. Louis Railway, that is, the Omaha Division, had exceeded its earnings by $5288.64, not including any charge for rental, and, including such charge, there was a deficit of $87,538.64. On April 16 the court made an order upon this petition to the effect that subdivisional accounts should be kept separately; that "where a subdivision earns no surplus, simply pays operating expenses, no rent or subdivisional interest will be paid. If the lessor or subdivisional mortgagee desires possession or foreclosure, he may proceed at once to assert his rights. While the court will continue to operate such subdivision until some application be made, yet the right of a lessor or mortgagee whose rent or interest is unpaid to insist upon possession or foreclosure will be promptly recognized."

The semi-annual instalment of interest or rent of the Omaha Division falling due April 1, 1885, being unpaid, a bill for the foreclosure of the mortgage upon that division was filed by the intervenor in the Circuit Court of Pottawatomie County, Iowa. The Wabash receivers were made defendants to the bill. This suit was removed to the Circuit Court of the United States for the Southern District of Iowa. Another default occurring October 1, 1885, the intervenor filed a second petition, and requested the transfer of the division to a receiver.

On December 2, 1885, the United States Trust Company filed another petition, in which it recited the defaults which had occurred in the payment of interest on the bonds secured on the Omaha Division, and prayed that the receivers of the Wabash system, Humphreys and Tutt, be ordered to surrender to the receivers, appointed or to be appointed in the foreclosure suits of the Omaha Division, all its property.

On January 6, 1886, the matter was called to the attention of the court, and the court thereupon entered an order directing the receivers, Humphreys and Tutt, to surrender within thirty days the Omaha Division to the United States Trust Company, or to any person or receiver appointed at their instance by the Circuit Court for the Southern District of

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Iowa, or by the state courts. There was a further clause in the order which authorized Humphreys and Tutt to retain possession of the Omaha Division for an additional thirty days, if the Wabash, St. Louis and Pacific Railway Company, or any one on its behalf, would pay to the United States Trust Company $13,708.33, which sum was equal to the interest for one month on the Omaha bonds. That amount was paid by the receivers, and there is no controversy here concerning it.

On March 3, 1886, Thomas McKissick was appointed receiver of the Omaha Division, and on March 6 the division was surrendered to him by Humphreys and Tutt. On April 23 the petition in this case was filed by the intervenor for the rental which accrued from October 1, 1884, to February 6, 1886, amounting to $222,075.77.

On the same day the order of surrender was made, namely, January 6, 1886, a decree of foreclosure and sale under the Wabash general and collateral mortgages was entered. This sale specially reserved all rights under the Omaha Division and other leases and mortgages, and adjudged that the receivers' surrender of any leased branch terminated the lease as of the date of the surrender. The sale of the road having been made and confirmed, the receivers were directed to transfer all the property to the Wabash Western Railway Company, a new corporation organized to take the property, the latter company agreeing to pay all claims and demands "growing out of the operation by said receivers of the railway property lately in their charge, which have been or may be adjudged to be superior in equity to the mortgages foreclosed by said decree." The transfer of the entire property was thereupon made to that company, and it has since assumed the defence of the intervenor's claim.

The master to whom the petition of the Trust Company for rent was referred made two reports. By the first report, the Trust Company was allowed a rental of $77,237.06, being a sum equal to the interest on the bonds from October 1, 1884, (the date of the last payment,) to April 16, 1885, the date on which the court ordered that no rent or subdivi-

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sional interest would be paid on lines that did not earn a surplus.

To this report the receivers filed exceptions which were sustained by the court, and the case referred back to the master with instructions to report, first, whether the Omaha Division had been retained by the receivers at the instance or for the benefit of the mortgagees under the Wabash general mortgage, after the United States Trust Company had demanded possession thereof; and, second, to ascertain and report what would be a reasonable rental for the line for the time it was so withheld. In his second report the master reviewed at some length the record in the case, and concluded that the value of the use and occupation of the property during the time it was withheld from the intervenor was the *pro rata* amount of the rental provided for in the lease, namely, $13,708.33 per month; that the intervenor had received the rental for thirty days of the period of detention, and was entitled to receive pay for two months more, or the sum of $27,416.66.

To this report both parties, the receivers and the Trust Company, excepted, and these exceptions having been filed, the court, on September 25, 1889, entered a decree that the exceptions should be sustained in so far as the report found that the intervenor was entitled to recover two months' rent of the mortgage property at the rate of $13,708.33 per month; but in so far as the report found that the intervenor was entitled to recover one month's rent, it was confirmed, and a final decree was entered for $13,708.33 and interest from January 6, 1886, making an aggregate amount of $16,765.51.

From that decree both parties appealed to this court.

Mr. Edward W. Sheldon and *Mr. Theodore Sheldon* for the United States Trust Company.

I. Where receivers elect to retain possession of property, real or personal, held under a contract of lease, they become liable, whether as equitable assignees of the lease or by virtue solely of such election, for the stipulated rent during the period of their possession.

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This statement of the law is axiomatic, and includes all classes of receivers. In the case of statutory receivers, liquidators and assignees in bankruptcy, the doctrine proceeds on the ground that on the election being made, the receiver or assignee becomes vested with the title to the leasehold interest, and a privity of estate is thereby created between the lessor and the receiver or assignee, by virtue of which the latter becomes liable on the covenants running with the "land." *Matter of Otis*, 101 N. Y. 580, 585. If any distinction is to be drawn in the case of chancery receivers appointed to preserve property *pendente lite*, while the courts are not always agreed in their reasoning, the liability is said to rest not on the theory of an equitable assignment to the receivers of the unexpired term, but on the fact of their adoption of an existing contract. Many authorities for this proposition might be cited, but the following will serve as illustrations: *Turner* v. *Richardson*, 7 East, 335; *Thomas* v. *Pemberton*, 7 Taunt. 206; *In re Oak Pits Colliery Co.*, 21 Ch. D. 322; *In re Silkstone & Dodworth Coal & Iron Co.*, 17 Ch. D. 158; *In re North Yorkshire Iron Co.*, 7 Ch. D. 661; *Ex parte Faxon*, 1 Lowell, 404; *Woodruff* v. *Erie Railway Co.*, 93 N. Y. 609; *People* v. *Universal Life Ins. Co.*, 30 Hun, 142; *Martin* v. *Black*, 9 Paige, 641; *Commonwealth* v. *Franklin Ins. Co.*, 115 Mass. 278; *People* v. *National Trust Co.*, 82 N. Y. 283, 288; *In re International Marine Hydropathic Co.*, 28 Ch. D. 470; *In re National Arms and Ammunition Company*, 28 Ch. D. 474; *In re Blackburn & District Benefit Building Soc.*, 42 Ch. D. 343.

This court has recently recognized the doctrine in its relation to both assignees in bankruptcy and chancery receivers. *Sparhawk* v. *Yerkes*, 142 U. S. 1. See also *Sunflower Oil Co.* v. *Wilson*, 142 U. S. 313; *Quincy, Missouri & Pacific Railroad* v. *Humphreys*, 145 U. S. 82; *Peoria & Pekin Union Railway* v. *Chicago, Pekin & Southwestern Railroad*, 127 U. S. 200; *Thomas* v. *Western Car Co.*, 149 U. S. 95.

II. The facts of the present case establish the election of the Wabash receivers to assume the lease of the Omaha Division from May 29, 1884, to March 6, 1886.

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This period naturally divides itself as follows: (1) From May 29, 1884, to October 1, 1884. Here the intervenor's claim was recognized, and payment of the rental received; (2) From October 1, 1884, to April 16, 1885. All the reasons which justified the payment of October, 1884, govern this second period; and (3) From April 16, 1885, to March 6, 1886.

With the announcement made by the court in April, 1885, our opponents contend that explicit notice was given that rent would only be paid when earned. On our side we contend, first, that the Omaha Division was, both by contemporaneous and subsequent action of court and receivers, exempted from the operation of this announcement; and, second, that the announcement itself never possessed the significance claimed for it.

Underlying the scheme of the bill in this case, as well as of the other pleadings, and the orders, petitions, and opinions filed in the cause, is the constant suggestion of the pressing need and paramount value of maintaining the congeries of roads as a system. That may be said to have been the basis, if not the justifying cause, of this extraordinary receivership. It was not from any philanthropic motive that these leasehold estates were included in the sequestrated property; nor was it until a much later period of the receivership that the theory of an obligation to the public to maintain every railroad which the receivers had undertaken to operate, found expression. Estates held by the Wabash Company on the condition of rent payments, need only have been regarded in the light of ordinary investments. If deemed unprofitable ventures, they could have been omitted from the list of property subjected to the receivership, or at any time thereafter surrendered by the receivers to the respective lessors. Only one conclusion is possible from this positive recognition of the leases, namely, that the continued operation of the leased lines was regarded as beneficial to the system. No occasion exists for speculation as to the receivers' motives. They have definitely expressed their intention and beliefs, and the result is spread upon the record. If their persistent determination

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to retain the Omaha Division did not constitute an election, it would indeed be difficult to imagine how, in a case like this, an election could be demonstrated.

III. No special differentiating circumstances prevent the necessity of the application of the general rule to the present case.

IV. On the theory of a *quantum valebat*, also, the intervenor is entitled to recover, since the retention of the Omaha Division inured directly to the benefit of the receivership property, and to an extent in excess of the intervenor's claim.

It appears from the testimony that from October 1, 1884, to March 6, 1886, the net revenue from business exchanged between the Wabash railroad and the Omaha Division was $1,551,919.25, of which the sum of $1,123,260.13 was set apart to the Wabash Company, and the remainder, $428,659.12, to the Omaha Division. The cost of hauling, the only expense to the Wabash Company in the case of a greater part of this business, was, in the estimation of the Wabash general manager, less than seventy per cent, and may not have exceeded fifty per cent of the revenue received. We thus ascertain that the clear net earnings from the use of the Omaha Division, during the period in question, were, at their lowest estimate, and this a hostile one, about $336,978.04, the equivalent of thirty per cent of $1,123,260.13, and may have equalled $561,630.06. Furthermore, the retention of the division made it possible to operate at a profit and *pay the rentals on* two adjoining leased lines, the Brunswick and Chillicothe and St. Louis, Council Bluffs and Omaha roads. Such a result gave practical justification to the attitude of the Wabash receivers in opposing the surrender or withdrawal of the division, and in instructing their counsel to "keep the road in the system if possible."

While the receivers' reports declared that the Omaha Division for a period of two years and a half barely earned its operating expenses, when the facts are known, we find that *in addition* to the earnings credited to it in the reports, it exchanged independent business with the Wabash Company

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which brought into the treasury of that company a clear profit ranging from $336,000 to $561,000, and enabled it to keep possession of and successfully operate eighty additional miles of leased roads. Under such conditions cannot equity be successfully invoked to secure a just compensation for the use of property which has demonstrated its value?

V. The income collected by the receivers is primarily charged with the payment of these claims, with recourse, if necessary, to the corpus of the property.

VI. The decree of the Circuit Court should be modified by increasing the judgment in favor of the intervenor from $16,765.51 to $222,075.77 with interest from February 6, 1886.

Mr. F. W. Lehmann for the Wabash Western Railway Company.

Mr. Wells H. Blodgett filed a brief for the Wabash Western Railway Company.

Mr. Thomas H. Hubbard filed a brief for the Wabash Western Railway Company.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

Stripped of its complications, this case involves to a certain extent the same question disposed of by this court in *Quincy, Missouri & Pacific Railroad* v. *Humphreys*, 145 U. S. 82, namely, whether the receivers of the Wabash system took possession of the leased lines under such circumstances as to charge them with the payment of the agreed rental so long as they retained possession of the lines.

The general rule applicable to this class of cases is undisputed that an assignee or receiver is not bound to adopt the contracts, accept the leases, or otherwise step into the shoes of his assignor, if in his opinion it would be unprofitable or undesirable to do so; and he is entitled to a reasonable time

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to elect whether to adopt or repudiate such contracts. If he elect to adopt a lease, the receiver becomes vested with the title to the leasehold interest, and a privity of estate is thereby created between the lessor and the receiver, by which the latter becomes liable upon the covenant to pay rent. *Sparhawk* v. *Yerkes*, 142 U. S. 1, 13; *Sunflower Oil Company* v. *Wilson*, 142 U. S. 313, 322; *Woodruff* v. *Erie Railway*, 93 N. Y. 609; *In re Otis*, 101 N. Y. 580, 585.

In this case, however, we are bound to consider the somewhat peculiar circumstances under which the receivers took possession of and operated the branch lines of the Wabash system. The bill was not an ordinary bill of foreclosure, but a bill filed by the mortgagor corporation for the purpose of preventing the disruption of the system, and securing a winding up of the old corporation and the organization of a new one, to which the various properties of the road should be transferred. The bill, which was certainly one of unusual character, purported to be filed not only for the benefit and in the interest of the mortgagor and the mortgagee, but also in the interest of the large number of branch corporations which were operated under one general management, and were a part and parcel of the Wabash system. Indeed, the bill expressly averred that defaults in the payment of interest were anticipated, and as soon as they should occur a number of suits would be commenced for the appointment of receivers under the original sectional mortgages executed by the leased corporations; that under the terms of such leases the lessor companies would declare a forfeiture of the rights of the complainant; that its road would be broken into fragments and would ultimately be sold in small sections, and a reëstablishment of its unity rendered impossible.

This court has already held in *Quincy &c. Railway Co.* v. *Humphreys*, 145 U. S. 82, 101, that after the appointment of receivers made in pursuance of the prayer of this bill "the court did not bind itself or its receivers" to pay the agreed rentals of a leased line "*eo instanti* by the mere act of taking possession. Reasonable time necessarily had to be taken to ascertain the situation of affairs. The Quincy Company,"

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(and the same remark may be made of the Omaha Division,) "as a *quasi* public corporation, operating a public highway, was under a public duty to keep up and maintain its railroad as a going concern, as was the Wabash Company under the contract between them; but the latter had become unable to perform the public services for which it had been endowed with its faculties and franchises, and which it had assumed to discharge as between it and the other company. Its operation could only be continued under the receivers, whose action in that respect cannot be adjudged to have been dictated by the idea of keeping the property in order to sell it, or using it to the advantage of the creditors, or doing otherwise than 'abstain from trying to get rid of the property.'" On May 27, 1884, Humphreys and Tutt were appointed receivers of the property and were directed to pay certain preferred claims, including rentals accrued or which might thereafter accrue, upon leased lines. On June 26, the receivers reported to the court that, from the incoming rents and profits of the property, they were unable to pay on June 1 the interest falling due upon certain divisional bonds, and prayed the advice of the court as to paying the interest on these bonds, and as to how they should dispose of the earnings of the other lines or divisions which had not and would not for the present be enough to pay the operating expenses, the cost of maintenance, and the interest upon the bonds. This petition was referred to a master, who made a report on June 28, upon which an order of court was entered that the receivers, "from the incoming rents and profits of said property, after meeting such other obligations as they have been directed to discharge by the former order of this court, pay from whatever balance may remain in their hands the interest, as the same may from time to time mature upon the following bonds," including those of the Omaha Division.

If this order of June 28 had been, as the court below seems at first to have construed it, (*Central Trust Co.* v. *Wabash &c. Railway*, 34 Fed. Rep. 259, 266,) "couched in such language that the intervenor had a right to rely upon it, and expect the payment of his rent, until some other order was made," there

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would be strong reason for saying that the receivers would be obligated to pay this interest as it matured. But upon a more careful examination of this order, upon a rehearing, the court came to the conclusion that it was not an absolute order to pay, but only an order to pay *after the preferential debts had been discharged.* 38 Fed. Rep. 63. We have no doubt of the correctness of this conclusion. The language of the order was that the receivers, "from the incoming rents and profits of said property, *after meeting such other obligations as they have been directed to discharge by the former order of this court, pay from whatever balance may remain in their hands.*" The other obligations they had been directed to discharge were fixed by the order of their appointment of May 27, as traffic balances, rentals accrued or to accrue upon leased lines, and for the use of terminal facilities and rolling stock, claims for labor, supplies, professional services, and salaries, maturing within six months before making the order, and current expenses for the operation of the road. It is true, as argued by the intervenors, that among the preferred claims mentioned in this order were the rentals due and to become due on leased lines, and that there was no order of payment or relative rank fixed between the preferred claims themselves, the court evidently supposing that the income of the road would be sufficient to pay all the preferred debts. It was impossible, however, for the court, in making the order of June 28, to have contemplated that the rental due the Omaha Division should be a preferred claim, inasmuch as the whole object of the order of June 28 was to provide for the payment of the interest due upon the bonds of this division, after the payment of preferred claims. There is an apparent incongruity between the two orders, but we think it clear that the object of the order of June 28 was, as stated, to pay only from the balance after the payment of the preferred claims, not including as a preferred claim the claim for rental.

The owners of the leased lines were fully apprised by this order of the fact that payment of interest upon their bonds was conditional upon such balance existing; and the fact was that, after paying the operating expenses of the lines and the

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labor and supply debts of the Wabash Company, there was never a balance in the hands of the receivers out of which they could pay either interest or rentals. In fact, the preferential indebtedness which the receivers were, by the order of May 27, directed to pay, amounted to over $4,000,000, and the total gross earnings of all the lines of the system, from the day the receivers were appointed to the time the Omaha Division was surrendered to its trustee, lacked over $2,000,000 of being sufficient to pay the operating expenses and the labor and supply debts of the Wabash Company. The receivers did in fact pay the agreed rental of the Omaha Division up to October 1, 1884, to the amount of $82.250. Now, if the owners of the Omaha branch or the trustees of its mortgage, knowing as they did that the system of which their road was a part had gone into the hands of receivers, and was being operated by them, had desired to repossess themselves of their property, or to object to the order of June 28, they should have intervened and asked the court to protect their interests. While they may not have been parties to this order directly, they were parties to the bill, and were bound to know that their property, in the hands of the receivers would or might be affected by orders which the court would make in the course of the administration of the insolvent estate, and should have made themselves parties to the proceedings that their rights might be protected. As was said in *Miltenberger* v. *Logansport Railway*, 106 U. S. 286, of certain mortgage creditors who had intervened to claim that certain expenditures had been made by receivers without authority, "it did not comport with the principles of equity for the appellants to lie by and see the court and the receiver dealing with the property in the manner now complained of, and content themselves with merely protesting generally and disclaiming all interest under the receivership, and yet assert . . . that the other property acquired by the receiver, and now alleged to have been acquired by him without authority, was subject to the lien of the first mortgage, and now claim the proceeds of all that property, without paying the debts incurred in acquiring it. A court of equity, however it might act on the question of

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original authority or discretion, if presented in season and under circumstances of good faith, will not visit upon innocent parties dealing with a receiver within the authority of its orders, consequences which result from the inequitable negligence and supineness of a party to the suit, or of those represented by him." So in *Meyer* v. *Johnson*, 53 Alabama, 237, 350, it is stated, inferentially at least, that whenever, in the course of a receivership, the court makes an order which the parties to the suit consider injurious to their interests, it is their duty to file a motion at once asking the court to cancel or modify it. See also *Wallace* v. *Loomis*, 97 U. S. 146; *Post* v. *Dorr*, 4 Edw. Ch. 1st ed. 412; 2d ed. 425.

It is well understood that, in the foreclosure of railroad mortgages, it often becomes necessary to provide for the payment of preferred claims, and to postpone all rights of ordinary creditors, and even of mortgagees, to these preferred classes, and that this is sometimes done from the necessities of the case without notice to all who may be affected thereby.

Nor is this aspect of the case changed by the fact that the earnings on the Omaha Division had previously been sufficient to pay the operating expenses, cost of maintenance, and interest upon its bonds, and that the receivers thought and believed such earnings would be sufficient to pay the interest as well as the preferred claims. Various things had occurred or might occur, such as failure of crops, injury from floods, or other disasters, to affect its earning capacity, and the trustees were bound to know that the insolvency of the entire system of which their road was a part could hardly fail to affect the value of their securities.

On March 20, 1885, the receivers filed another petition, stating that the earnings of many of the lines had not been sufficient to pay the operating expenses, interest on bonds, and the rentals contracted to be paid, among which lines was the Omaha Division, the expenses of which, not including any charge for rental, had exceeded its earnings by $5288.64, and praying the court to make such orders with respect to the future operation of such lines and the payment of the respective rentals as should seem proper to the court. In response thereto, the

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court, on April 16, ordered that subdivisional accounts should be kept separately; that where any subdivision earned a surplus over expenses, the rental or subdivisional interest would be paid to the extent of the surplus; where it earned no surplus, but simply operating expenses, no rent or subdivisional interest would be paid; and where not only was no surplus earned, but an actual deficiency existed, operating expenses would be reduced to a minimum. At the time this order was granted there was some conversation between counsel, in which it was said to be the wish of the receivers not to include in this proceeding the Omaha Division; but it was qualified by the express statement of the receivers that they did not wish to be understood as promising the bondholders the payment of the interest on the bonds within a short period of time under the circumstances.

This order was certainly notice to the branch lines that they must not expect payment of their rental where the subdivision earned nothing beyond operating expenses. The Trust Company, however, did not at this time see fit to intervene and demand possession of the property, but upon default in the payment of the interest due April 1, 1885, filed a bill of foreclosure in the state court, making the receivers parties to the bill. This suit was removed, upon petition of the receivers, to the Circuit Court of the United States. It was not until December 2 that the Trust Company petitioned the court for the surrender of the property. Under these circumstances, we do not think the receivers are chargeable with the unpaid rent. It is possible that the Trust Company acted under a misapprehension of its rights, but it is more probable that they expected the earnings of the road would be sufficient to entitle them to their interest under the orders of June 28 and April 16. There appears to have been no good reason why demand was not made long before for the surrender of the property. It is true the receivers filed in the state court an answer consisting of a single sentence denying generally the allegations of the bill, and in November following they removed the case to the Circuit Court of the United States; but there was nothing in all this to prevent the Trust Company from

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applying to the United States court for possession of the property.

There is another reason, however, why the Trust Company is not entitled to the rental of this property prior to demanding possession thereof in its bill of foreclosure. The petition avers that by reason of the defaults in the payment of the rentals the receivers "are indebted to your petitioner for the use and occupation of the said demised premises under the said lease." But the mortgage or deed of trust to the Trust Company, the petitioner, did not purport to convey any of the incomes or earnings of the road, but provided that if default should at any time occur in the payment of interest, the trustee should, when requested so to do, take possession of the mortgaged property and operate the same, and collect and receive all the tolls and income thereof. It was also provided that, until such default, the mortgagors should be entitled to have and to hold the possession of the railroad, and collect, receive, and retain all the revenues arising from its use.

There was also a guaranty mortgage executed by the Council Bluffs and St. Louis Railroad Company to the same trustee, conveying all its right, title, interest, and estate in the demised premises with all the mortgagor's rights, privileges, and franchises, acquired or to be acquired, subject only to the lease. Now, if the mortgage had covered the earnings and rentals of the property, and those had constituted a part of the estate conveyed to the Trust Company as security for the bonds, there would be some reason for saying that it would be entitled to recover these earnings and rentals in this action before it demanded possession of the road. But where the mortgage provides that the mortgagor shall remain in possession until default, but when default occurs the trustee may enter, this court has held that the trustee can only secure the earnings of the mortgaged property by taking or demanding possession. And in *Galveston Railway* v. *Cowdrey*, 11 Wall. 459, 483, it was held that, even where the mortgage covered the tolls, income, and profits of the railroad, whenever the company should be in default of payment, but a subsequent clause provided that in case the company should be in default

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in payments of principal or interest for three months, the trustees should take possession of the road, and collect and receive the tolls, income, and profits, etc., it was held that, until regular demand was made for the payment of tolls and income, the defendants were not bound to account therefor. So in *Gilman* v. *Illinois & Mississippi Telegraph Co.*, 91 U. S. 603, the trustee in a mortgage, which covered a road with its revenues and incomes, sought to recover as against a general creditor a fund that had been earned before the trustee took possession of the mortgaged property. The deed of trust in that case provided that if default occurred in the payment of interest, the trustee might take possession, and receive the income and earnings of the road, and apply them to the debt secured. The court held that the trustees had no claim upon the fund. In delivering the opinion of the court, Mr. Justice Swayne observed: "It is clearly implied in these mortgages that the railroad company should hold possession and receive the earnings until the mortgagee should take possession, or the proper judicial authority should interpose. Possession draws after it the right to receive and apply the income. . . . In this condition of things, the whole fund belonged to the company, and was subject to its control. It was, therefore, liable to the creditors of the company as if the mortgages did not exist. They in nowise affected it. If the mortgagees were not satisfied, they had the remedy in their own hands, and could at any moment invoke the aid of the law or interpose themselves without it."

In *American Bridge Co.* v. *Heidelbach*, 94 U. S. 798, the mortgage included the rents, issues, and profits of a certain bridge, in so far as the same were not necessary to pay its operating expenses and the cost of keeping it in repair. The question in the case was whether earnings that had accrued from the use of the bridge before the bill of foreclosure was filed by the trustee were covered by the mortgage and prevailed over the rights of a judgment creditor. In this case it was said that "the mortgage could have no retrospective effect as to previous income and earnings. The bill of the trustees does not affect the rights of the parties. It is an

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attempt to extend the mortgage to what it cannot be made to reach. Such a proceeding does not create any new right. It can only enforce those which exist already."

There are a number of other cases in this court to the same effect. *Kountze* v. *Omaha Hotel Company*, 107 U. S. 378, 392; *Freedman's Saving Co.* v. *Shepherd*, 127 U. S. 494; *Sage* v. *Memphis & Little Rock Railroad*, 125 U. S. 361; *Dow* v. *Memphis & Little Rock Railroad*, 124 U. S. 652; *Teal* v. *Walker*, 111 U. S. 242.

The substance of these rulings is that until the mortgagee asserts his rights under the mortgage to the possession of the road by filing a bill of foreclosure, or, if the road be in the hands of a third party, by demanding possession of such party, he has no right to its earnings and profits. In other words, there is no privity of contract or of estate between the mortagee and lessee, at least until the mortgagee has taken possession of the property, and become the assignee of the rights of the mortgagor.

On December 2, 1885, the Trust Company made formal application to the court for the transfer and surrender of the Omaha Division to a receiver to be appointed in the suits then pending for the foreclosure of the mortgage. The motion was called to the attention of the court on December 8, and was opposed by counsel for the Central Trust Company of New York, the trustee of the Wabash general mortgage, upon the ground that the application should be postponed until January 4, 1886, when the decree in the Wabash suit would be presented to the court for settlement, and the matter of this petition, as well as all other questions, could be presented and passed upon. This application for the postponement was resisted by the counsel for the United States Trust Company, but was granted by the court, which expressed an unwillingness to permit the further disintegration of the system. No order was made at this time with respect to the rental. Upon the renewal of the application, on January 6, the court ordered a surrender to be made within thirty days, with an option to the Wabash receivers to retain the division for an additional thirty days, on the payment of one month's rent, namely,

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$13,708.33. The receivers availed themselves of this option, and paid the rent, with the hope that during that time some arrangement might be made to keep the line within the system, so that the surrender did not actually take place until March, 1886. As the rent for the last thirty days was paid, the sole remaining questions are as to the rent from December 9 to February 6.

The master to whom the case was referred reported that the Trust Company was entitled to the two months' rental at $13,708.33 per month. But the court, upon hearing exceptions to such report, was of the opinion that, while the receivers were liable for the first month's rental, namely, from December 7 to January 6, upon the ground that the delay upon the consideration of the motion was opposed by the counsel of the Trust Company, the further delay of thirty days was with their consent, hence, that they were equitably estopped from claiming rental for the second month.

We agree with the court below in this conclusion. When the motion was called up, on December 6, the Trust Company insisted upon its right to have an immediate surrender of the road, and opposed even a postponement of thirty days. Possession of the road being withheld from them without their assent, they are equitably entitled to rent for this month. But the order entered on January 6, directing the receivers at the expiration of thirty days from that date to surrender possession to a receiver to be appointed by the United States Circuit Court, having been entered by consent of the parties — in other words, the Trust Company having waived the delivery of the road for thirty days, it ought not now to insist upon payment for that period. Indeed, as the receiver of the Omaha Division had not then been appointed, it is difficult to see to whom the road could have been immediately turned over.

As bearing upon the general equities of the case, it may be remarked that, while the proceedings in the foreclosure of the Wabash mortgage did undoubtedly result in the detention of the road from its lawful owners for about fifteen months without the payment of the agreed rent, the road during this time earned nothing beyond its operating expenses, and there

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is nothing to indicate that it would have done so in the hands of its owners, so that in fact they lost nothing. Indeed, it is scarcely credible that they would have delayed so long to demand possession of the road if in their opinion it could have been operated at a profit.

The decree of the court below is, therefore,

Affirmed.

SENEY *v.* WABASH WESTERN RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

No. 26. Argued October 23, 24, 1893. — Decided November 20, 1893.

This case is not distinguishable in principle from *United States Trust Company* v. *Wabash Western Railway Company*, *ante*, 287.

THIS was also an intervening petition against Humphreys and Tutt, receivers of the property of the Wabash, St. Louis and Pacific Railway Company, and was instituted by Seney as trustee in a mortgage covering what was known as the "Clarinda branch" of the Wabash Railway, to recover a rental equal to the interest at six per cent on $264,000 of bonds, from August 1, 1884, to April 1, 1886, which bonds were secured by a mortgage to Seney as trustee.

On July 15, 1879, the Clarinda and St. Louis Railroad Company, being the owner of a projected railway, eleven miles in length, extending from Clarinda, Iowa, in a southerly direction to a point on the state line between Iowa and Missouri, leased its road to the St. Louis, Kansas City and Northern Railway, the owner of another road extending from that point on the state line to Rosebury, Missouri. For the purpose of raising the funds necessary to complete and equip that branch, the lessee issued bonds to the amount of $264,000, interest payable in February and August, and mortgaged both branches of the

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Statement of the Case.

line to Seney as trustee. The mortgage to Seney did not purport to convey to him any of the income or earnings of the road. By way of further assurance, the Clarinda and St. Louis Company executed to the same trustee a guaranty mortgage conveying all its right, title, and interest in the road subject only to the lease.

Upon the execution of this lease and these mortgages, which formed a single transaction, the St. Louis, Kansas City and Northern Railway took possession of the demised premises, and with the proceeds of the bonds constructed and subsequently operated the Clarinda branch until November 10, 1879, when it was consolidated with the Wabash Company and subsequently became a part of the Wabash, St. Louis and Pacific Company. This branch passed into the hands of the receivers and became subject to the orders of May 27, June 28, 1884, and April 16, 1885, referred to in the previous case.

Seney, the trustee, did not attempt possession of the premises until March 22, 1886, when he filed his petition in the Wabash case, reciting the defaults that had occurred in the payment of interest upon the bonds secured by his mortgage, and praying for the surrender of the road to a receiver to be appointed by another court in a suit brought to foreclose his mortgage. On April 6, 1886, the court ordered the surrender made. While the Clarinda branch was in possession of the receivers, they expended in necessary maintenance, operation, and taxes a large sum in excess of the gross earnings therefrom. The master to whom the case was referred was of the opinion that, under the order of June 28, 1884, the receivers were only bound to pay the interest on the Clarinda bonds after meeting such other obligations as they had been directed to pay by the former orders of the court; found that the petitioner had not brought himself within the terms of that order; and recommended that the petition be dismissed, which was subsequently done. 34 Fed. Rep. 259; 38 Fed. Rep. 63. From this decree Seney appealed to this court.

The case was argued with Nos. 51 and 57, *ante*, 287.

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Syllabus.

Mr. Edward W. Sheldon and *Mr. Theodore Sheldon* for appellant.

Mr. F. W. Lehmann for appellee. *Mr. Wells H. Blodgett* and *Mr. Thomas H. Hubbard* filed briefs for the same.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

This case differs from the preceding one in the facts that rental to the amount of $7920 was paid to August 1, 1884, instead of October 1, and possession of the road was ordered to be surrendered to Seney as trustee on April 6, 1886. No complaint was made of unnecessary delay in giving up possession after application was made therefor. The case is not distinguishable in principle from the other, and the decree of the court below dismissing the petition is, therefore,

Affirmed.

STURM *v.* BOKER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

No. 14. Argued October 13, 1893. — Decided November 20, 1893.

In 1867 B. and S. entered into a contract which was evidenced by the following writings, signed by them respectively. (1) B. to S., dated September 18: "Enclosed please find our bill of sundry arms, etc., amounting to $39,887.60, for which amount please give us credit on consignment account. As mutually agreed, we consign these arms to your care, to be shipped to Mexico and to be sold there by you to the best advantage. Should these arms not be disposed of at the whole amount charged, we have to bear the loss. Should there be any profit realized over the above amount of bill, such profit shall be equally divided between yourself and us. Also, it is understood that all these goods are shipped by you free of any expenses to us, and that in case all or any of them should not be sold, they shall be returned to us free of all charges. As you have insured these goods, as well as other merchandise, we should be pleased to have the amount of $40,000 transferred to us. Please

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Syllabus.

acknowledge the receipt of this, expressing your acquiescence in above, and oblige." Accompanying this was an invoice headed "S. in joint account with B." To this S. replied the same month: "I have the honor to acknowledge the receipt of your letter of the 18th inst., in which you enclose bill of sundry arms, amounting to $39,887.60, consigned to me upon certain conditions contained in said letter. In reply I have to say that I accept the terms of said conditions of consignment, and as soon as I obtain the policies of insurance upon said goods will transfer them to you." In October B. wrote S.: "Enclosed we beg to hand you our bill for muskets, amounting to $10,175, for which please give us credit on consignment account. As mutually agreed, we consign these arms to your care, to be shipped to Mexico, and to be sold there by you to the best advantage. Should these arms not be disposed of at the amount charged, we have to stand the loss. Should there be any profit realized over the amount, such profit shall be equally divided between yourself and us. It is also understood that these goods shall be shipped by you free of any expenses to us, and that in case they should not find a ready sale, they shall be returned to us free of all charges. Please attend to the insurance of this lot and have the amount transferred to us in one policy; also please acknowledge the receipt of this, stating your acquiescence in above." Accompanying this was an invoice headed: "S. bought of B. in joint account." The goods were shipped for their destination in Mexico. S. took out policies of insurance on the September shipments in his own name "for account of whom it might concern," which policies were handed to B. by direction of S. The October shipments reached their destination. A large part of the September shipments was lost. B. collected the insurance on such of the policies as were in his hands. *Held*,

(1) That the contract was not a contract of sale of the goods by B. to S., but a bailment upon the terms stated in the correspondence, and as it was clearly expressed in the writings between the parties, it could not be varied by the terms of the printed bill-head of the invoice;

(2) That S., as bailee, was exempted by the common law from liability for loss of the consigned goods arising from inevitable accident;

(3) That there was no undertaking in the contract on his part which took him out of the operation of the common law rule;

(4) That the taking of the policies of insurance in his own name by S. did not tend, under the circumstances, to establish that he recognized his liability for the loss of the goods, as it was clear that, under a policy running to S. "for account of whom it might concern," B. could show and recover, in event of loss, his interest, which was a substantial one;

(5) That certain statements made by S. did not amount to an estoppel, the rule being that a statement of opinion upon a question of law, where the facts are equally well known to both parties, does not work an estoppel.

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Statement of the Case.

THE court stated the case as follows:

This suit, as originally instituted, was an action at law by the appellant in the Superior Court of Marion County, Indiana, against the defendants, to recover the sum of $238,000, with interest thereon, which sum, the plaintiff alleged, they were indebted to him. The defendants, being citizens of New York, removed the cause to the Circuit Court of the United States, and, as the claim involved various matters of account, running through a period of several years, the court, on motion of the defendants, transferred the cause to the equity docket, and required the plaintiff to reform his pleadings. In compliance with this order, the plaintiff filed his bill of complaint, setting forth various transactions involving matters of account between himself and the defendants, commencing in September, 1867, and continuing down to September, 1876. The answer of the defendants admitted many of the facts charged, and either denied others or set up new matter in avoidance thereof.

The several items of account presented by the pleadings need not be specially mentioned or separately considered; nor is it deemed necessary, in the view we entertain of the case, to review the immense volume of testimony taken in the course of the litigation — covering about four thousand printed pages — involving irreconcilable conflicts, and including much that is wholly irrelevant. The material facts are clearly established by the written agreement of the parties, and by the admissions made in the pleadings; and the controlling question of law arising thereon, and upon which the correctness of the decree dismissing the bill must be determined, is whether the court below placed the proper construction upon the original contract entered into between the parties, under which the defendants consigned certain arms and munitions of war to the complainant, to be by him shipped to and sold in Mexico. That contract, after some previous verbal negotiations, was embraced in the following correspondence:

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Statement of the Case.

"Office of Hermann Boker & Co., No. 50 Cliff Street.

"NEW YORK, *September* 18*th*, 1867.

"General H. STURM, present.

"DEAR SIR: Enclosed please find our bill of sundry arms, etc., amounting to $39,887.60, for which amount please give us credit on consignment account.

"As mutually agreed, we consign these arms to your care, to be shipped to Mexico and to be sold there by you to the best advantage. Should these arms not be disposed of at the whole amount charged, we have to bear the loss. Should there be any profit realized over the above amount of bill, such profit shall be equally divided between yourself and us.

"Also, it is understood that all these goods are shipped by you free of any expenses to us, and that in case all or any of them should not be sold, they shall be returned to us free of all charges.

"As you have insured these goods, as well as other merchandise, we should be pleased to have the amount of $40,000 transferred to us. Please acknowledge the receipt of this, expressing your acquiescence in above, and oblige,

"Yours truly,

"HERMANN BOKER & Co."

Accompanying this letter was an invoice, in form as follows:

"No deduction allowed for errors or damages unless claim is made within five days after the goods are received.

"Herman Funke. Folio —.

"F. A. Boker. 50 CLIFF STREET, NEW YORK,

"F. Schumacher. *Sept.* 18*th*, 1867.

"Mr. H. Sturm in joint acc't with Hermann Boker & Co.

"Payable in gold.

"Terms, net cash.

"Forwarded for your account and risk, per —— ——:

"1 12-pounder battery, brass, complete..	$9,000	
"1 3-rifled do. iron do. ..	8,000	
		$17,000

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Statement of the Case.

"73 cases of 20 ea. } 1,470 Springfield R.			
" 1 " 10 " } muskets, 8.00....	11,760		
"74 cases, 3.50.....	259		
			12,019
"1,000 r'ds fixed ammunition, 12 p., 2.00	2,000		
" 504 " " 24 pd., 2.00	1,008		
"209 boxes:			
"100,000 Enfield cartridges, 12.00.....	1,200		
"100 boxes:			
"200,000 Maynards, 20.50.....	4,100		
			8,308
"200 boxes:			
"670 perc. shell, 3 Hotchkiss, 1.25.....	837 50		
"680 time fuse, 3 " 1.25.....	850 00		
"270 case shot, 3 " 1.55.....	428 50		
"180 canister, 3 " 1.00.....	180 00		
"153 boxes, painted.....1.50.....	229 50		
" 27 " not painted.....1.30.....	35 10		
			2,560 60
			"$39,887 60."

To which the complainant replied:

"New York, *September 26th*, 1867.

"Messrs. Hermann Boker & Co.

"Gents: I have the honor to acknowledge the receipt of your letter of the 18th inst., in which you enclose bill of sundry arms, amounting to $39,887.60, consigned to me upon certain conditions contained in said letter.

"In reply I have to say that I accept the terms of said conditions of consignment, and as soon as I obtain the policies of insurance upon said goods will transfer them to you.

"Very respectfully, your ob't servant,

"H. Sturm."

There was another consignment, the terms of which are contained in the letters of October 24, 1867, as follows:

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"NEW YORK, *October 24th*, 1867.

"General H. STURM, present.

"DEAR SIR: Enclosed we beg to hand you our bill for muskets, amounting to $10,175, for which please give us credit on consignment account.

"As mutually agreed, we consign these arms to your care, to be shipped to Mexico, and to be sold there by you to the best advantage.

"Should these arms not be disposed of at the amount charged, we have to stand the loss. Should there be any profit realized over the above amount, such profit shall be equally divided between yourself and us.

"It is also understood that these goods shall be shipped by you free of any expenses to us, and that in case they should not find a ready sale, they shall be returned to us free of all charges.

"Please attend to the insurance of this lot and have the amount transferred to us in one policy; also please acknowledge the receipt of this, stating your acquiescence in above. We likewise beg to hand you enclosed the San Francisco draft of Placido Vega, $63,699.60 gold, with protest and power of attorney to collect, with legal interest, same attached. We will allow you a commission for collecting this draft and interest for us of ten per cent off the amount.

"Be kind enough to acknowledge the receipt of this draft.

"Wishing you a pleasant trip and prosperous affairs, we beg to remain

"Yours truly,

"(Signed) HERMANN BOKER & Co."

"NEW YORK, *October 24th*, 1867.

"General H. STURM.

"DEAR SIR: We beg to refer to our annexed letter, contents of which we expressed according to our mutual agreement. We now beg to say, in order to avoid any misunder-

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standing hereafter, that with regard to the two lots of new Springfield rifles shipped to your care, viz.:

"1470 and 74 cases and
"1000 " 50 "

we should direct as follows:

"Should these mentioned arms not bring the prices as charged by us, viz., $8.00 apiece for the first and $10.00 apiece for the second lot, then we would respectfully request you to have them returned to us free of expenses, as agreed.

"Please express your acquiescence in above and oblige,

"Yours truly,

"(Signed) HERMANN BOKER & Co."

The invoice which accompanied this last consignment is as follows:

"Office of HERMANN BOKER & Co.,

"No. 50 Cliff Street, New York, October 24, 1867.

"H. Sturm, Esq., N. Y.:

"Bought of Hermann Boker & Co., in joint account,

"50 cases containing:

"1000 new Springfield muskets @ $10.....$10,000
"50 cases @ $3.50..... 175

$10,175"

While it is clearly established that both of these consignments were made upon the same terms and conditions, the invoices which accompanied them differed in some respects. The bill accompanying the October consignment was entirely in writing, while the invoice accompanying the September consignment was written under a printed bill-head of the defendants. The printed heading was not changed except by erasing the words "bought of" and inserting in their place the words "Mr. H. Sturm in joint acc't with." The words "payable in gold" appear to have been stamped on the bill, but whether this was done at the time of its delivery to the complainant or subsequently, when the defendants regained possession of

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the bill, is a question of dispute between the parties, and under the testimony it is a matter of grave doubt whether they formed a part of the invoice bill as originally rendered; but it is not deemed necessary to determine this controverted question of fact.

The October consignment, which was insured by the defendants themselves, and was shipped by the steamer Wilmington, reached Mexico safely, and causes no controversy between the parties except as to a portion of the proceeds arising from the sale thereof, which was received by the defendants.

The September consignment, together with similar goods of the value of $169,516, belonging to the complainant, were shipped on the schooner Keese and brig Blonde. The Blonde carried of the consigned goods $10,568.60, and of the complainant's goods $17,250; while the Keese carried of the consigned goods $29,327, and of complainant's goods $152,266.

The goods shipped on both vessels were insured in fourteen separate policies. These policies were made out in the name of Sturm "for account of whom it might concern." The whole amount of insurance on the goods carried by the Blonde was $30,000, while the total insurance on the goods, individual and consigned, carried by the Keese was $163,000. This insurance was effected through an insurance broker, who was informed that the defendants had an interest of about $40,000 in the goods to be covered by the policies, and who was directed to consult Mr. Funke, the member of defendants' firm with whom the complainant had chiefly conducted the transaction in controversy, as to how these policies should be made. This he did, and with the consent and by the direction of Mr. Funke he took the whole lot of insurance together, in the name of complainant "for account of whom it might concern," and appropriated for the benefit of the defendants, and handed over to them by the instruction of the complainant and of Funke, four policies on the cargo of the Keese amounting to $55,000, issued respectively by the Sun, the New York, the Orient, and the Mercantile Insurance Companies; and one policy for $15,000 issued by the United States Lloyds Insurance Company on the cargo of the Blonde. These

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four policies on the Keese together with one on the Blonde the insurance broker selected for the defendants at their request, as being issued by good companies, and they were delivered to the defendants about the date of their issuance.

The policies thus delivered to them, as understood by the broker who selected and turned them over to the defendants, were intended to cover their interest in the insured cargoes of the Keese and the Blonde. The amount of the policies so delivered to defendants was in excess of the invoice prices of the consigned goods, for the reason, as alleged, that policies covering the exact amount could not be selected, but with the understanding that the excess was to be held for account of the complainant.

The vessels carrying the cargo sailed for Mexico in September, 1867, a few days after the insurance was effected. On the voyage the Blonde was caught in a storm, and part of her cargo was thrown overboard to save the vessel. The insured goods had to contribute to the general average the sum of $1463.84, which was paid by the complainant, who also paid out the further sum of $672.78 for repairing part of the consigned goods, which reached Mexico in a damaged condition. Half of the amount paid on general average, and the amount paid for repairs upon the consigned goods, are the only items of account in controversy, so far as concerns the shipment made upon the Blonde — nothing having been recovered, either by complainants or defendants, upon the insurance policies taken out on the cargo which she carried. That shipment, except in respect to the items paid on general average and for repairs, may, therefore, be dropped out of further consideration.

The Keese, carrying $29,327 of the consigned goods and $152,266 of complainant's individual goods, and covered by twelve policies of insurance, amounting to $163,000, was wrecked on her voyage without fault or negligence on the part of complainant, and her cargo was totally lost.

The complainant had reached Havana, on his way to Mexico, when he learned of the loss of the Keese and her cargo, and promptly notified the defendants by telegram of the fact. The defendants thereupon called for and received from the com-

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plainant's agent in New York City the invoice which accompanied the consignment of September 18, 1867, for the purpose of preparing and making proof of the loss. The insurance companies refused to pay the policies on various grounds, which need not be noticed here.

The complainant returned to New York in March, 1868, and learning that the insurance companies contested their liability for the loss, arranged with the defendants to institute suits against the companies to recover on the policies held by them respectively. The defendants employed Mr. Da Costa to sue upon the policies held by them, while the complainant employed Mr. Parsons to sue upon his, and the lawyers were to coöperate and assist each other in the prosecution of all the suits.

About the time this arrangement was made the complainant opened a bank account with the defendants, and thereafter made deposits with and drew checks and drafts upon them as his bankers down to the latter part of 1875.

The litigation against the insurance companies continued until September 13, 1876, when the last collection upon the policies was made. During the progress of the litigation the complainant turned over, or assigned, to the defendants such judgments as he had obtained, and such policies standing in his name as had not been reduced to judgment, as alleged, for the purpose of convenience in collection and settlement, and with the view of having the amounts collected thereon placed to his credit. The funds collected upon all the policies, amounting to about $109,000, went into the hands of the defendants. The complainant claims that his interest and that of defendants in the amounts recovered is in the ratio of $152,266 to $29,327, that being their relative proportion in the total amount of insurance, and that the defendants ought to account to him according to that proportion, and pay their just share of the expenses incident to the collection thereof, as well as compensate him for his services in connection with the suits. These and other smaller items of account constitute the matters in controversy.

While admitting the general facts in respect to the transac-

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tion, the defendants set up in their answer that by the terms of the contract the complainant became the insurer of the goods, and was bound thereby to either sell them in Mexico and account for the proceeds, or to return them to New York free of all expense to the defendants; and that, recognizing such liability, the complainant insured all the goods, making no distinction in the manner of such insurance between his individual goods and the consigned goods; and that the policies transferred to the defendants by the complainant were transferred as collateral security for the performance of the contract, which was upon a gold valuation, and that no part of the policies was held in trust for the complainant.

On this theory the defendants kept their account of the transaction in the name of the "Mexican Arms Account," in which the goods consigned were charged at the price of $39,887.60, and to this was added the premium upon gold at 45 per cent, amounting to $17,949.42; and on the aggregate of these two sums interest was computed from September, 1867, to May 1, 1882, amounting to $53,801.28. This account was also charged with the expenses connected with the suits on the policies turned over to them, amounting with interest to $16,710.72. These expenses consisted of attorneys' fees and sundry outlays for witnesses in connection with the suits. These various items were not charged or entered as debits against Sturm until 1876, when they were transferred from the "Mexican Arms Account" to his account.

The defendants' construction of the contract and method of keeping the account was not communicated to the complainant until some time in 1876, when he promptly denied its correctness. The court below adopted the defendants' interpretation of the contract, holding that the consigned goods were at the risk of complainant; that he was responsible for their loss, although arising from inevitable accident, because he had undertaken to return them if not sold, and that, being so responsible, the defendants had a right to charge him with the value thereof, and treat the policies turned over to them as collateral security for this liability; and were furthermore entitled to charge him with the expenses of collecting such

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policies, so that the complainant was entitled to credit only for the net amounts collected thereon. For this and the further reason — as the court assumed — that the complainant had given testimony in the insurance cases and made admissions under oath which were inconsistent with his present claim, and which should repel him from a court of equity, his bill was dismissed.

If, by the terms of the contract, as embodied in the letters of September 18 and October 24, 1867, the title to the goods vested in the complainant, or they were to be at his risk during their transit to Mexico, then it is conceded that upon an adjustment of the accounts between the parties on that basis — with the allowance to the defendants of a premium of 45 per cent for gold — there is little or nothing due to the complainant, and no substantial error in the decree dismissing his bill; on the other hand, if the title to the goods delivered did not vest in the complainant under the terms of the consignment, or he was not responsible for the loss of the same by inevitable accident, then the court below was in error in dismissing his bill and denying the account sought.

Mr. John M. Butler and *Mr. Solomon Claypool*, (with whom was *Mr. William A. Ketcham* on the brief,) for appellant.

Mr. Albert Baker and *Mr. William D. Guthrie*, (with whom was *Mr. Clarence A. Seward* on the brief,) for appellees.

I. The bill was properly dismissed for want of equity. The actions against the insurance companies were prosecuted, and the payment of the policies was ultimately compelled, upon the claim that the legal title to the consigned goods was in the complainant Sturm by purchase; that the shipment was at his risk, and that he was liable to the defendants, Hermann Boker & Co., for the invoice value of the consigned goods, payable in gold. If the claim as made in the insurance litigation was true, the complainant concededly and indisputably has no cause of action in this suit. Sturm, in the

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course of that litigation, repeatedly swore that he was the owner of, and liable for, the value of the consigned goods; but he now pretends that these oaths were false, and virtually confesses that the New York courts were then deceived and the insurance companies defrauded for the benefit of himself and the defendants.

It must be borne in mind that this perjury in the insurance cases was for the purpose of fastening liability upon the insurance companies, and recovering on the basis of legal ownership and liability, on Sturm's part, for the value in gold of the consigned goods; that this position was vital to the insurance cases as then framed, without which nothing could have been recovered, because he could not have established sufficient insurable interest; and that the parties have succeeded in collecting from the insurance companies on that basis. It matters not from what aspect we look at the bill of complaint herein: whether brought for an accounting of the $109,126.27 collected from the insurance companies, or brought to obtain reimbursement for expenses and payment for services. The money was collected by perjury; the expenses were incurred and the services rendered in the perpetration of a fraud. Even if we assume that the complainant's charge that the defendants participated in this fraud is true, we are, nevertheless, entitled to the benefit of the maxim, "*in pari delicto, potior est conditio defendentis.*" *Dent* v. *Ferguson*, 132 U. S. 50; *Creath's Administrator* v. *Sims*, 5 How. 192; *Wheeler* v. *Sage*, 1 Wall. 518; *Selz* v. *Unna*, 6 Wall. 327; *Kitchen* v. *Rayburn*, 19 Wall. 254; *Bartle* v. *Coleman*, 4 Pet. 184; *Hanauer* v. *Woodruff*, 15 Wall. 439; *Higgins* v. *McCrea*, 116 U. S. 671; *Cragin* v. *Powell*, 128 U. S. 691; *Prince Mf'g Co.* v. *Prince Metallic Paint Co.*, 135 N. Y. 24; *Stephens* v. *Robinson*, 2 Cr. & Jer. 209; *Harmer* v. *Westmacott*, 6 Sim. 284; *De Metton* v. *De Mello*, 12 East, 234; *Post* v. *Marsh*, 16 Ch. D. 395; *In re Great Berlin Steamboat Co.*, 26 Ch. D. 616.

II. The consigned goods, under the original contract between the parties, were shipped at Sturm's risk, and, upon their loss at sea, he was liable to pay for the same at the invoice value thereof.

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Argument for Appellees.

The legal effect of the agreement to return the consigned goods free of all charges and expenses to the defendants was to make him liable as purchaser in case of failure to return. Such was the practical interpretation acted on by the parties, sworn to by Mr. Sturm in the insurance litigation, acquiesced in for at least nine years. The contract, therefore, as so interpreted and acted upon, was not a bailment, but a conditional sale, with the option to return if not sold. *Moss* v. *Sweet*, 16 Q. B. 493, 494; *Martineau* v. *Kitching*, L. R. 7 Q. B. 436, 455; *Schlesinger* v. *Stratton*, 9 R. I. 578, 581.

If it be insisted that the title did not pass to the vendee, the intention that the risk should be assumed by him will nevertheless prevail and be given full effect. *Fragano* v. *Long*, 4 B. & C. 219; *Castle* v. *Playford*, L. R. 7 Ex. 98; *Martineau* v. *Kitching*, *supra*; *Stock* v. *Inglis*, 12 Q. B. D. 564.

The appellant's counsel may urge that the conduct of the parties, until the present litigation, proceeded upon an erroneous construction and misconception of the complainant's legal rights, and that the complainant acted honestly but mistakenly in the insurance litigation. In view of his own testimony in this case, such a claim is preposterous. But, even if there had been no fraud, and the meaning of the original understanding was doubtful, the court would not set aside the practical interpretation of the parties themselves at the time of the shipment and during the following nine years. If we add to this practical construction, the proceedings, testimony, and arguments in the insurance litigation, the conclusion must be irresistible that the invoice recited truly what had been understood and agreed, namely, that the goods were to be shipped at the risk of Sturm. *Chicago* v. *Sheldon*, 9 Wall. 50; *District of Columbia* v. *Gallaher*, 124 U. S. 505; *Knox County* v. *Ninth Nat. Bank*, 147 U. S. 91; *Topliff* v. *Topliff*, 122 U. S. 121.

III. The Circuit Court properly held that the bill of complaint was based upon an agreement alleged to have been made after the contract of consignment.

Reference to the bill of complaint will show, beyond question, that the claim for expenses and for services rendered is alleged to be based upon an express oral agreement entered

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into on the 21st and 27th of March, 1868. The principal, if not practically the only, controversy below was as to this oral agreement. The issue tendered, and which the defendants in coming into court prepared to meet, was this oral agreement as alleged in the bill of complaint. The complainant should not be permitted to change front and to claim upon an implied obligation, after averring an express contract covering the same subject matter. The issue between the parties thus tendered was not that of an implied obligation springing from the original contract of consignment, but (to repeat) an express oral contract to share in the expenses and to pay him for services rendered. The fundamental rule of equity pleading and practice requires relief to be awarded *secundum allegata et probata*, and does not permit a complainant to insist upon relief because the facts, as proved, entitle him to advance some other claim than that alleged in the bill. *Simms* v. *Guthrie*, 9 Cranch, 19; *Carneal* v. *Banks*, 10 Wheat. 181; *Foster* v. *Goddard*, 1 Black, 506; *Harrison* v. *Nixon*, 9 Pet. 483; *Boone* v. *Chiles*, 10 Pet. 177; *Agawam Co.* v. *Jordan*, 7 Wall. 583; *Rubber Co.* v. *Goodyear*, 9 Wall. 788.

Mr. Justice Jackson, after stating the case, delivered the opinion of the court.

It is too clear for discussion or the citation of authorities, that the contract was not a *sale* of the goods by the defendants to Sturm. The terms and conditions under which the goods were delivered to him import only a consignment. The words "consign" and "consigned" employed in the letters were used in their commercial sense, which meant that the property was committed or entrusted to Sturm for care or sale, and did not by any express or fair implication mean the sale by the one or purchase by the other. The words, "Mr. H. Sturm in joint account with Hermann Boker & Co.," or "Bought of Hermann Boker & Co., in joint account," in the bill-head, cannot be allowed to control the express written terms contained in the contract as set forth in the letters. A printed bill-head can have little or no influence in changing

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the clear and explicit language of the letters, and it in no way controls, modifies, or alters the terms of the contract. The purpose and object of the bill was to give a description and valuation of the articles to which the contract as embraced in the letters had reference, their description being important if the articles had to be returned, and their price or valuation necessary if they were sold and profits were made for division. The contract being clearly expressed in writing, the printed bill-head of the invoice can, upon no well-settled rule, control, modify, or alter it. That the invoice was not intended to have that effect is shown by the fact that the invoice of the consignment of October 24 differed in several respects from the invoice of September 18, although the terms and conditions in respect to each consignment were the same.

In *Schenck* v. *Saunders*, 13 Gray, 37, 40, there was a written agreement in these terms:

"The said Schenck, Wood & Pond of the first part agree to furnish the stock, consisting of upper and sole leather and linings, and bindings, of sufficient amount to make at least eight, and not to exceed twenty, cases per week. And the said Charles Howe of the second part is to take the stock, and make it up to the best of his abilities into women's boots; and further agrees to consign all the goods he makes to the said Schenck, Wood & Pond of the first part to be sold by them on commission of five per cent, the goods to be sold for cash, and the returns made to the said Charles Howe as fast as made. And the said Charles Howe of the second part agrees to put up and ship to the said Schenck, Wood & Pond, at their store in New York, at least eight cases of boots per week, each case containing sixty pairs, commencing the first week in May, 1856."

With each shipment of leather to Howe, Schenck, Wood & Pond sent him unsigned bills, like those in the present case, in this form:

"Boot, Shoe and Leather Warehouse.

"Mr. Charles Howe, New York, *May* 15, 1856.

"Bought of Schenck, Wood & Pond,

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"Manufacturers and Commission Merchants, No. 25 Beekman Street.

"Terms 6 months.

"52 sides, sole leather B. A., 644, 26½..... $170 66
"Inspection and cartage 90

"$171 56"

In a contest as to the title of these goods, (boots,) between Schenck, Wood & Pond and an assignee of Howe, it was contended among other things that the invoices showed that the transaction was a sale to Howe, and the heading of the bills was relied upon to give such construction to the contract. The Supreme Court of Massachusetts, speaking by Bigelow, J., held that the transaction was not a sale, and that "the bills of parcels which were sent from time to time with the merchandise were susceptible of explanation by parol evidence, and did not change the terms of the written agreement under which the property was sent to Howe. They were sent only as memoranda of the amount and value of the merchandise transmitted. *Hazard* v. *Loring*, 10 Cush. 267."

"An invoice," as said by this court in *Dows* v. *National Exchange Bank*, 91 U. S. 618, 630, "is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity, and cost or price of the things invoiced, and it is as appropriate to a bailment as it is to a sale. . . . Hence, standing alone, it is never regarded as evidence of title."

Was the contract, as claimed by counsel for the defendants, a contract of "sale or return"? We think not. The class of contracts, known as contracts of "sale or return," exist where the privilege of purchase or return is not dependent upon the character or quality of the property sold, but rests entirely upon the option of the purchaser to retain or return. In this class of cases the title passes to the purchaser subject to his option to return the property within a time specified, or a reasonable time, and if, before the expiration of such time, or the exercise of the option given, the property is destroyed,

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even by inevitable accident, the buyer is responsible for the price.

The true distinction is pointed out by Wells, J., in *Hunt* v. *Wyman*, 100 Mass. 198, 200, as follows: "An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return."

The cases cited and relied on by the defendants, *Moss* v. *Sweet*, 16 Q. B. 493, 494; *Martineau* v. *Kitching*, L. R. 7 Q. B. 436, 455; *Schlesinger* v. *Stratton*, 9 R. I. 578, 581, involved contracts of "sale or return," in which there was a sale followed by a destruction of the property before the option of the purchaser had expired or had been exercised. It was properly held in these cases that the goods were at the risk of the purchaser pending the exercise of the option, and that he was responsible for the loss of the goods or the price to be paid therefor. These authorities are not in point in the present case.

The contract under consideration did not confer upon the complainant the privilege of purchasing or returning the goods within any specified or reasonable time, for the defendants retained by express stipulation a right to share in the profits made on the sale of the goods in Mexico, and if they were not sold to have the specific goods returned to them without expense. In the letter of October 24 they specially direct that the Springfield rifles, including those covered by the consignment of September 18, as well as those covered by the consignment of October 24, should be returned if they did not realize the prices indicated in the invoices.

The contract in its terms and conditions meets all the requirements of a bailment. The recognized distinction between bailment and sale is that when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed. On the other hand, when there is no obligation to return the specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, and

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the title to the property is changed; the transaction is a sale. This distinction or test of a bailment is recognized by this court in the case of *Powder Co.* v. *Burkhardt*, 97 U. S. 110, 116.

The agency to sell and return the proceeds, or the specific goods if not sold, stands upon precisely the same footing, and does not involve a change of title. An essential incident to trust property is that the trustee or bailee can never make use of it for his own benefit. Nor can it be subjected by his creditors to the payment of his debts.

Testing the present case by these established principles, it admits of no question that the contract was one of bailment, and that the title to the goods, with the corresponding risk attached to ownership, remained with the defendants. Suppose a creditor of Sturm had levied upon or seized these goods after they reached his possession; it cannot be doubted that the defendants could have recovered them as their property.

That the contract between the parties in reference to the goods in question was a bailment upon the terms stated in the letters, is clearly established by the authorities. Among others, see *Hunt* v. *Wyman*, 100 Mass. 198; *Walker* v. *Butterick*, 105 Mass. 237: *Middleton* v. *Stone*, 111 Penn. St. 589.

The complainant's common law responsibility as bailee exempted him from liability for loss of the consigned goods arising from inevitable accident. A bailee may, however, enlarge his legal responsibility by contract, express or fairly implied, and render himself liable for the loss or destruction of the goods committed to his care — the bailment or compensation to be received therefor being a sufficient consideration for such an undertaking.

This brings us to the question whether, by the terms and conditions of the contract, as embraced in the letter of September 18, consigning the goods, it can be held that the complainant assumed such a risk in the present case. He assumed the expenses of transporting the goods to Mexico, the duty of selling them to the best advantage after they reached there, the

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obligation to account to the defendants for the price at which they might be sold, less one-half of the profits in excess of the invoice price, and if not sold, he was to return the specific articles to the defendants free of expense. This agreement to return the goods, in the event they should not be sold, it is urged, imposed upon him the risk of their destruction before he had an opportunity to sell or dispose of them under or in accordance with the terms of the consignment. We cannot accede to the correctness of this proposition. The destruction of the goods, without fault or negligence on his part, terminated his obligation to make either a return thereof, or pay for their loss. Such a liability could only be imposed upon him by a contract clearly expressing his assumption of the risk of destruction, or his liability for the loss.

In the case of *Hunt* v. *Wyman*, 100 Mass. 198, the bailee was to return the property (a horse) in as good condition as he received it by a designated time. The property was so injured without fault on his part that it could not be returned within the time agreed upon, and no attempt was made to return it; still it was held that he was not responsible for the property. The court said: "A mere failure to return the horse within the time agreed may be a breach of contract, upon which the plaintiff is entitled to an appropriate remedy; but has no such legal effect as to convert the bailment into a sale. It might be an evidence of a determination by the defendant of his option to purchase. But it would be only evidence. In this case the accident to the horse, before an opportunity was had for trial in order to determine the option, deprives it of all force, even as evidence."

In *Walker* v. *Butterick*, 105 Mass. 237, the following contract was presented:

"BOSTON, *November 25th*, 1868.

"Alexander & Company of the first part are to take goods from Walker & Company of the second part, and to return to them, the said Walker & Company, every thirty days, the amount of sales, at the prices charged by the said Walker & Company, who will furnish Alexander & Company all goods

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in their line. Alexander & Company are worth in real estate and money $5000, of which they hereby certify.

"(Signed) ALEXANDER & Co.

"We agree to the conditions of the within instrument.

"(Signed) WALKER & Co."

It appears that some months after the date of this contract, Alexander & Co. absconded, and one of their creditors levied upon goods which had been furnished by Walker & Co. The court held that the contract under which Walker & Co. claimed title to the goods levied upon, imported a consignment of the goods for sale, and not a sale of them by Walker & Co. to Alexander & Co., so that the title remained in Walker & Co.

In *Middleton* v. *Stone*, 111 Penn. St. 589, A delivered to B two colts, under a contract that B should safely keep and sell them, if possible, before a certain date for A, he fixing a minimum price to be received by him, and in addition thereto one-half of all money obtained above that price to the extent of $25; and, if not sold, to return the animals in good condition. Held, that this was not a sale but a bailment, and it was error, therefore, to overrule the offer of B to show that the colts were sick when they were delivered to him; that one of them died, and that he then offered to return the other to A, who refused to receive it. It was held that the horses were at the risk of A.

It is next urged, on behalf of the defendants, that the taking of the insurance in the name of complainant was a recognition of his responsibility for the loss of the goods, and that the policies of insurance were turned over to them to secure this liability of the complainant. This position cannot be sustained, for the reason that defendants, through their partner, Funke, directed that all the insurance should be taken out together in the name of Sturm; and also instructed the insurance broker to select for them the policies which they wished appropriated to secure their interest. The act of taking out the insurance, in the manner in which it was done, was their act as much as it was the act of Sturm, and the in-

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surance having been thus effected in no way tends to establish the contention that it was a recognition of Sturm's liability for the loss of the goods.

It is not material to determine whether the complainant ever endorsed and transferred these four policies to the defendants, or, if so, whether it was done at the time of their delivery or subsequently, for no such assignment or transfer thereof was necessary to have enabled the defendants to recover on the policies for the loss of cargo to the extent of their interest in the same, it being well settled that under a policy running to Sturm, "for account of whom it might concern," the defendants could show and recover their interest, in the event of loss. It was so ruled by this court in *Hooper* v. *Robinson*, 98 U. S. 528, where it was said that "a policy upon a cargo in the name of A, 'on account of whom it may concern,' or with other equivalent terms, will inure to the interest of the party for whom it was intended by A, provided he, at the time of effecting the insurance, had the requisite authority from such party, or the latter subsequently adopted it."

In the present case, Sturm had the requisite authority of the defendants to make the insurance on the consigned goods, as was testified to by the insurance broker, and as shown in their letter of September 18, 1867, in which they say: "As you have insured these goods, as well as other merchandise, we should be pleased to have the amount of $40,000 transferred to us." It is clear that the insurance to the extent of $40,000 was intended to cover the interest of the defendants in the consignment of September 18, 1867, and, in the absence of any delivery or transfer of policies representing that interest, this could have been shown by them so as to entitle them to the benefits of such insurance.

It is next urged, and the court below seems to have taken the same view of the matter, that the complainant is estopped from denying his responsibility for the loss of the goods, because of alleged statements made by him as a witness in the suits upon the insurance policies. It is claimed that in those suits he testified under oath that he was the owner of the goods, and thereby precluded himself from asserting anything

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to the contrary in this case, under the wise and salutary doctrine which binds a party to his judicial declarations, and forbids him from subsequently contradicting his statements thus made. We do not controvert the soundness of this general rule as laid down in the cases cited by the defendants. *Dent* v. *Ferguson*, 132 U. S. 50; *Creath's Administrators* v. *Sims*, 5 How. 192; *Wheeler* v. *Sage*, 1 Wall. 518; *Selz* v. *Unna*, 6 Wall. 327; *Kitchen* v. *Rayburn*, 19 Wall. 254; *Bartle* v. *Coleman*, 4 Pet. 184; *Sample* v. *Barnes*, 4 How. 70; *Hanauer* v. *Woodruff*, 15 Wall. 439; *Higgins* v. *McCrea*, 116 U. S. 671; *Cragin* v. *Powell*, 128 U. S. 691; *Prince Mfg. Co.* v. *Prince Metallic Paint Co.*, 135 N. Y. 24; *Stephens* v. *Robinson*, 2 Cr. & Jer. 209; *Harmer* v. *Westmacott*, 6 Sim. 284; *De Metton* v. *De Mello*, 12 East, 234; *Post* v. *Marsh*, 16 Ch. D. 395; *In re Great Berlin Steamboat Co.*, 26 Ch. D. 616. But the question here is whether the statements made by the complainant in the insurance suits bring him within the operation of this wholesome rule? We think not, for it would be pressing his language too far to hold that he made any positive statement to the effect that he was the absolute owner of the goods, or that he admitted as a matter of fact, rather than of opinion, that he was responsible for their loss. What he did state, when his testimony is read as a whole, was that he was the owner *on consignment*, for when the direct question was put to him, "What do you mean by being the owner for the time being?" his reply was, "That they were delivered to me by Hermann Boker & Company under that agreement, and I was responsible for those goods until they were returned, or until I delivered the money to them. This is what I mean." And in reply to another question, he stated that "the terms on which I was the owner were expressed in the papers I furnished," referring to the letters of September 18 and October 24, 1867.

And to the further question whether he understood that those contracts made the goods his property, his answer was, "I understood so at the time, certainly, and I believe so yet."[1]

[1] In the trial of the *Great Western case*, Sturm's complaint therein was placed in his hands, and he was asked whether he knew it contained this

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This language did not mislead or induce either the defendants or the insurance companies to alter or change their posi-

clause, "that at the time said policy was so effected, and all the time down to the said loss, the plaintiff was the owner of said cargo?" and he answered, "Yes, sir."

"Question. Was that true?

"Answer. Yes, sir.

"Q. Was it true in respect to the goods consigned to you by H. B. & Co.?

"A. Yes, sir."

Asked in the present case whether he so answered in the *Great Western case*, he answered:

"A. Those questions were put to me and I answered them in that way, and at the time, by advice of counsel, I was correct."

In the same case he was questioned and made answer as follows, referring to the Boker goods:

"Q. When did you become the owner of them?

"A. I had the whole responsibility.

"Q. When did you become the owner of the goods?

"A. The moment they were delivered on board the Keese."

In the same case he was questioned and made answer as follows:

"Q. What do you mean by being the owner for the time being?

"A. They were delivered to me by H. B. & Co. under that agreement, and I was responsible for those goods until they were returned or until I had delivered the money to them. That is what I mean."

Sturm in 1876, in the trial of the case of *Funke* v. *The New York Mutual*, referring to the Boker goods, was questioned and made answer as follows:

"Q. Was this entire cargo your property?

"A. I was responsible for the whole of it — in the event of loss I had to pay for it.

"Q. That is not an answer to my question.

"A. At the time I signed that paper — (paper referred to was his complaint against the Lloyds).

"Q. Was it true, as you swore in those pleadings, that these goods were all your property?

"A. Yes, I believed that the whole of that property was mine at that time.

"Q. Were the Boker goods yours which were consigned to you?

"A. That is true; the terms on which I was the owner were expressed in the papers I furnished.

"Q. Do you understand that that made them your property? — Did you understand that these letters made these consigned goods your property?

"A. I understood so at the time, certainly, and I believe so yet."

On page 503, Sturm's attention was called to his testimony in this same case where he testified in 1876 as follows, referring to the September consignment from Funke:

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tion in any respect whatever, nor influence their conduct in any way. Both the defendants and the insurance companies had the written contracts before them, and were presumed, as a matter of law, to know their legal effect and operation. What the complainant said in his testimony was a statement of opinion upon a question of law, where the facts were equally well known to both parties. Such statements of opinion do not operate as an estoppel. If he had said, in express terms, that by that contract he was responsible for the loss, it would have been, under the circumstances, only the expression of an opinion as to the law of the contract, and not a declaration or admission of a fact, such as would estop him from subsequently taking a different position as to the true interpretation of the written instrument.

In *Brant* v. *Virginia Coal & Iron Co.*, 93 U. S. 326, 337, it was said: "Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel."

So in *Brewster* v. *Striker*, 2 N. Y. 19, and *Norton* v. *Coons*, 6 N. Y. 33, and approved in *Chatfield* v. *Simonson, et al.*, 92 N. Y. 209, 218, where it was ruled "that the assertion of a legal conclusion, where the facts were all stated, did not operate as an estoppel upon the party making such assertion."

In Bigelow on Estoppel (§ 2, pp. 572, 573, 5th ed.) it is properly said: "The rule we apprehend to be this: that where the statement or conduct is not resolvable into a statement of fact, as distinguished from a statement of opinion or of law, and does not amount to a contract, the party making it is not bound, unless he was guilty of clear moral fraud, or unless he stood in a relation of confidence towards him to whom it was made. If the statement, not being contracted to be true, is understood to be opinion, or a conclusion of law from a com-

"Question. Did you buy them from him; or were they consigned to you under these two letters?

"Answer. They were consigned to me. I could do with them just as I liked; either pay the money or return them.

"Q. Did you pay Funke anything for them?

"A. I did not."

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parison of facts, propositions or the like, and *a fortiori* if it is the declaration of a supposed rule of law, the parties may, with the qualification stated in the last sentence, allege its incorrectness." And again (§ 2, p. 571): "A representation *in pais* in writing, when not a part of a deed or made the subject of a contract, though on oath, is no more efficacious, so far as the question of estoppel is concerned, than a verbal statement."

These authorities lay down the correct rule to be applied in the present case, and, tested by the principle they announce, the complainant is not estopped from claiming his rights under a proper construction of the contract, notwithstanding what he said in the insurance cases.

The grounds of estoppel against the complainant are not nearly so strong as they are against the defendants. It is clearly shown that Funke, a member of defendants' firm, in March, 1876, on the trial of the suit against the New York Mutual Insurance Company upon one of the policies in question, distinctly swore that the complainant was indebted to them only to the extent of $32,000, and that they had *no security whatever* for the payment of that indebtedness. In his testimony in the present case he fails to explain that sworn statement. That sworn statement is inconsistent with the claim now made that the complainant was at that time indebted to the defendants to the amount of over $140,000; and it is furthermore inconsistent with the position now taken that they held all the insurance policies, amounting to $163,000, as collateral security for complainant's indebtedness. These sworn statements of Funke related to facts which were as well, if not better, known to the witness at that time than in 1882, and subsequently, when he testified in this case. Those statements are unexplained, and if they do not operate as an estoppel upon the defendants from now claiming a larger indebtedness than was then stated, and from claiming that all the policies were turned over to them as collateral security, they certainly cast suspicion and discredit upon their testimony in the present case. The question of estoppel need not be further discussed.

Upon the written contract, and all the relevant and compe-

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tent evidence connected therewith, we are of opinion that the construction which the lower court placed upon the contract was incorrect; that the complainant was not an insurer of the goods; that he was not responsible for their loss; that the policy of $15,000 on the cargo of the Blonde turned over to the defendants was intended to cover their interest in that consignment, amounting to $10,560, and that the four policies on the Keese's cargo delivered to them were to protect their interest in the consigned goods carried by that vessel, to the extent of $29,327; that they held these policies to pay that amount in case of loss, and that the surplus, if any, was to be held in trust for the complainant. But if there were any doubt on this question, Exhibits "H" and "F," which were produced by the complainant during the progress of the suit, place the matter beyond all dispute. Said exhibits are as follows:

"EXHIBIT 'H.'

"MEMORANDUM. New York, October 11th, 1867.

"We have received from Johnson & Higgins $163,000 policies on the schooner 'Keese' and $30,000 on the brig 'Blonde,' as per statement attached. We directed them to insure our goods for $40,000, which covers our bill of September 18th, and premium, but no profit. To enable us to select our policies, General Sturm has endorsed in blank, five policies, amounting to $70,000, as follows:

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MEMORANDUM. [SEAL.]

"On 'Keese' the Orient Mutual $15,000 and New York Mutual $12,500, Sun Mutual $12,500 and Mercantile Mutual $15,000.

"On 'Blonde' the United States Lloyds policy for $15,000 which we have taken as ours. Leaving a balance for us to select on 'Keese' of $25,000 of which we have so far selected only the Orient, and as we cannot divide the policies to suit us we hereby agree this day to keep all the four policies on the 'Keese' for the joint account of ourselves and General H. Sturm, and in case of any accident or loss we will collect the amount of the policies from the companies and pay over to General Sturm his share, viz.: 30–55 of the whole amount collected, and we also agree to pay the premium notes for our share of the policies and to stand all loss, if any should happen to our goods. General Sturm is to bear the shipping expenses only, and in no event shall he be held responsible for any accident or damage, or any act of the Mexican Government; but in case he cannot sell the arms at the price agreed upon and has to return them, he shall insure them for our account.

"The foregoing is hereby fully approved and agreed to.

"HERMAN BOKER & Co."

"EXHIBIT 'F.'

"MEMORANDUM: We have insured our goods on the 'Keese' and 'Blonde' for a maximum of $40,000, which includes the premium, which we have to pay. In case of accident we select our policies and we stand all loss and Gl. Sturm pays shipping expenses only. We hold in trust for Genl. Sturm $30,000 policies on the 'Keese' and also a package of Mexican bonds left over from the $105,000 delivered to us Sept'br. 20th. We also now direct Gl. Sturm to dispose of the batteries at any price.

"Steamer Wilmington, October 25, '67.

"HERMAN BOKER & Co."

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These exhibits were vigorously attacked by the defendants, who at first claimed that both the body and signatures of the documents were forgeries. They afterwards admitted that the signatures were genuine, but insisted that the writing above them was forged. A great deal of proof was taken to establish this contention, but it fails, in our opinion, to show that these documents were forgeries. The signatures being genuine, the burden of proof was clearly upon the defendants to establish that the written part above the signatures was forged. The delay in the production of these documents is fairly accounted for by the complainant, and they are in harmony with what, we think, was the true nature and character of the contract and agreement of the parties.

Some reliance is placed upon what is called a statement of his account made to Sturm in Indianapolis in May, 1875, by Boker, one of defendants' firm. This account was clearly a partial one. It was made up by Rabing, the bookkeeper of defendants, not from their books, but from memoranda furnished him by Boker, but from what source he obtained it does not appear. The correctness of the account — shown by loose slips of paper and imperfect memoranda — was disputed by Sturm, and it is now conceded by defendants that it was not a full and accurate statement. Sturm claimed that they had not given him credit for money collected on his insurance policies, and that when they were all included the defendants would be indebted to him. The circumstances attending the presentation of this account, made at a time when Sturm was contemplating going into bankruptcy, tends strongly to show that the defendants were endeavoring to induce him to admit a much larger indebtedness to them than really existed, in order to give them an advantage in the event of bankruptcy. But, however that may be, there was no stated account accepted or acquiesced in by Sturm, such as would either conclude or require him to surcharge and falsify the same.

We have not deemed it necessary to determine whether the September invoice had on it the printed words "payable in gold" when it was delivered. Those words form no part of

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the contract as embodied in the letter of September 18, 1867, and complainant's acceptance thereof. They do not impose upon the complainant the liability to account for the value of the goods in gold in the event of loss by inevitable accident; and not being responsible for the goods, nor liable for the loss thereof, neither he, nor the proceeds of his insurance policies, can properly be subjected to the burden of making good either the defendants' loss, or paying such losses in gold. The insurance, as defendants admit, was not on a gold basis, but only for the invoice price of the goods in currency. The complainant was not an insurer, nor in any way liable for even the currency value of the consigned goods, and it would be a perversion of the contract and inequitable to require either him or his policies to compensate the defendants for their loss in gold.

We think the complainant has failed to make out a claim to compensation for his services in attending to the suits against the insurance companies.

In our opinion the complainant is entitled to the account he seeks by his bill, in which he should be credited with the amounts received by the defendants on the insurance policies in the proportion of $152,266 to $29,327, that being their relative interest in the cargo of the Keese; that the expenses of the litigation, including counsel fees, should be divided between the parties on the same basis; that the complainant is entitled to one-half of the sum of $1463.84, paid by way of general average on the goods shipped on the Blonde; to the further sum of $672.68, for repairing the goods which reached Mexico in a damaged condition; and for whatever defendants realized on life insurance policies of the complainant and on the notes arising from the sale of the Indianapolis lots, if the amount so realized did not have to be repaid in taking up the notes; and with such other amounts as he may have placed in the hands of the defendants, either in the bank account or in the transaction connected with the insurance policies; and the defendants will be credited with all the amounts paid to and for the account of complainant not covered by the foregoing rulings. The account will be stated up to the filing of the bill, and any

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balance shown in favor of either side will bear interest from that date.

The decree is reversed, and the cause is remanded to the court below, to be proceeded with in conformity with this opinion.

GIBSON *v.* PETERS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

No. 61. Argued November 2, 1893. — Decided November 13, 1893.

The receiver of a national bank is an officer and agent of the United States within the meaning of those terms as used in Rev. Stat. § 380, providing that all suits and proceedings arising out of the provisions of law governing national banking associations, in which the United States or any of its officers or agents are parties, shall be conducted by the District Attorneys of the several districts, under the direction and supervision of the Solicitor of the Treasury.

If a District Attorney of the United States, acting under the provisions in Rev. Stat. § 380, conducts a suit or proceeding arising out of the provisions of law governing national banking associations, he is entitled to no remuneration other than that coming from his salary, from the compensation and fees authorized to be taxed and allowed, and such additional compensation as is expressly allowed by law, specifically, on account of services named.

THE plaintiff in error brought this action against the defendant in error as receiver of the Exchange National Bank of Norfolk, to recover the value of legal services alleged to have been rendered, or offered to be rendered, by him as United States District Attorney in a certain suit brought in the name of that receiver against one R. H. McDonald, which suit was subsequently, in August, 1885, dismissed on motion of the receiver as settled.

Pursuant to a written stipulation of the parties, the case was heard by the court without a jury. Judgment was rendered for the defendant in conformity with the opinion of the Circuit Judge. 35 Fed. Rep. 721, 729; 36 Fed. Rep. 487. The case is before this court upon a certificate of division of opinion.

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Statement of the Case.

There was evidence, on behalf of the plaintiff, as to the extent and value of the services rendered, or offered to be rendered, by him as United States District Attorney. The defendant introduced evidence tending to show that the plaintiff had neither rendered, nor been requested by the receiver to render, any services in the action against McDonald; that by direction of the Comptroller of the Currency the receiver employed other counsel; that the plaintiff's present claim had never been presented to the Treasury Department, nor been allowed by the Comptroller of the Currency; and that he had not been directed by the Solicitor of the Treasury to render the alleged services.

The following are the questions upon which the judges were divided in opinion:

1st. Whether the United States District Attorney is entitled by virtue of his office to appear and act as counsel for the receiver of a national bank in collecting its assets and winding up its affairs without the request or consent of said receiver, and without the direction of the Solicitor of the Treasury?

2d. Whether, conceding his right so to appear, and he does so appear of his own motion, he is entitled to any extra compensation beyond that prescribed by law for his official services?

3d. Whether, conceding his right so to appear, and act, he is entitled to any extra compensation beyond that provided by law for his official services, except such as the Comptroller of the Currency may allow after his claim therefor has been presented to the Treasury Department, according to the provisions of section 299 of the Revised Statutes?

4th. Whether the United States District Attorney, whose official service had been tendered to such receiver and declined by him for the reason that he had employed other counsel acting under the directions of the Comptroller of the Currency and Solicitor of the Treasury, is entitled to extra compensation for such offer of services, whether the service was rendered by the District Attorney or not?

5th. Whether, conceding his right so to receive extra com-

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pensation when he has offered to appear and act as official counsel without the request or consent of the receiver, is such compensation payable out of the assets of the bank in the hands of the receiver or out of the funds provided by law for the payment of District Attorneys for their official services?

Mr. Robert M. Hughes for plaintiff in error.

Mr. L. T. Michener and *Mr. T. S. Garnett*, (with whom was *Mr. W. W. Dudley* on the brief,) for defendant in error.

Mr. Justice Harlan, after stating the case, delivered the opinion of the court.

It is provided by section 380 of the Revised Statutes of the United States, that all suits and proceedings arising out of the provisions of law governing national banking associations, in which the United States or any of its officers or agents are parties, shall be conducted by the District Attorneys of the several districts under the direction and supervision of the Solicitor of the Treasury.

The suit brought against McDonald was one arising out of the provisions of the act of Congress governing such associations, and the receiver in whose name it was instituted was an officer and agent of the United States within the meaning of the above section. *Kennedy* v. *Gibson*, 8 Wall. 504; *Price* v. *Abbott*, 17 Fed. Rep. 506; *Frelinghuysen* v. *Baldwin*, 12 Fed. Rep. 395; *Hendee* v. *Connecticut &c. Railroad*, 26 Fed. Rep. 677; *Pacific Bank* v. *Mixter*, 114 U. S. 463.

But the important inquiry is whether a District Attorney is entitled to special compensation for services rendered by him in a suit of the class mentioned in section 380.

The appellant's contention is that he is entitled to reasonable compensation, to be paid from the funds in the hands of the receiver, under that clause of the statute relating to the dissolution and receivership of national banking associations, which provides that all expenses of any receivership shall be paid out of the assets of such association before distribution of the proceeds thereof. Rev. Stat. § 5238.

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Opinion of the Court.

Section 770 of the Revised Statutes fixes the sum which a District Attorney is entitled to receive on account of salary.

Sections 823 to 827, inclusive, prescribe certain fees that may be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to District Attorneys and to other officers. Those sections are as follows:

"SEC. 823. The following and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors, and printers in the several States and Territories, except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties.

"SEC. 824. On a trial before a jury, in civil or criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars: *Provided*, That in cases of admiralty and maritime jurisdiction, where the libellant recovers less than fifty dollars, the docket fee of his proctor shall be but ten dollars. In cases at law, when judgment is rendered without a jury, ten dollars. In cases at law, when the cause is discontinued, five dollars. For *scire facias*, and other proceedings on recognizances, five dollars. For each deposition taken and admitted in evidence in a cause, two dollars and fifty cents. For services rendered in cases removed from a District to a Circuit Court by writ of error or appeal, five dollars.

"For examination by a District Attorney, before a judge or commissioner, of persons charged with crime, five dollars a day for the time necessarily employed. For each day of his necessary attendance in a court of the United States on the business of the United States, when the court is held at the place of his abode, five dollars; and for his attendance when the court is held elsewhere, five dollars for each day of the

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term. For travelling from the place of his abode to the place of holding any court of the United States in his district, or to the place of any examination before a judge or commissioner, of a person charged with crime, ten cents a mile for going and ten cents a mile for returning. When an indictment for crime is tried before a jury and a conviction is had, the District Attorney may be allowed, in addition to the attorney's fees herein provided, a counsel fee, in proportion to the importance and difficulty of the cause, not exceeding thirty dollars.

"SEC. 825. There shall be taxed and paid to every District Attorney two per centum upon all moneys collected or realized in any suit or proceeding arising under the revenue laws, and conducted by him, in which the United States is a party, which shall be in lieu of all costs and fees in such proceeding.

"SEC. 826. No fee shall accrue to any District Attorney on any bond left with him for collection, or in a suit commenced on any bond for the renewal of which provision is made by law, unless the party neglects to apply for such renewal for more than twenty days after the maturity of the bond.

"SEC. 827. When a District Attorney appears by direction of the Secretary or Solicitor of the Treasury, on behalf of any officer of the revenue in any suit against such officer, for any act done by him, or for the recovery of any money received by him and paid into the Treasury in the performance of his official duty, he shall receive such compensation as may be certified to be proper by the court in which the suit is brought, and approved by the Secretary of the Treasury."

Another section authorizes just and suitable compensation to be made to District Attorneys in prize causes. Rev. Stat. § 4646.

The above provisions must, however, be construed in connection with sections 1764 and 1765, which are as follows:

"SEC. 1764. No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same or any other department; and no allowance or compensation shall be made for any extra services whatever, which any officer or

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clerk may be required to perform, unless expressly authorized by law.

"SEC. 1765. No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

It ought not to be difficult under any reasonable construction of these statutory provisions to ascertain the intention of Congress. A distinct provision is made for the salary of a District Attorney, and he cannot receive, on that account, any more than the statute prescribes. But the statute is equally explicit in declaring, in respect to compensation that may be "taxed and allowed," that he shall receive no other than that specified in §§ 823 to 827 inclusive, "except in cases otherwise expressly provided by law." It, also, declares that no officer in any branch of the public service shall receive any additional pay, extra allowance, or compensation, in any form whatever, for any service or duty, unless the same is expressly authorized by law, or unless the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation. No room is left here for construction. It is not expressly provided by law that a District Attorney shall receive compensation for services performed by him in conducting suits arising out of the provisions of the national banking law in which the United States or any of its officers or agents are parties. Without such express provision, compensation for services of that character cannot be taxed, allowed, or paid. Nor can the expenses of the receivership be held to include compensation to the District Attorney for conducting a suit in which the receiver is a party, for the obvious reason that the statute does not expressly provide compensation for such services. Congress evidently intended to require the performance by a District Attorney of all the duties imposed upon him by law, without any other remuneration than

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that coming from his salary, from the compensation or fees authorized to be taxed and allowed, and from such other compensation as is expressly allowed by law specifically on account of services named.

Nothing in the last clause of § 823 militates against this view. On the contrary, the proper interpretation of that clause supports the conclusion we have reached. Its principal object was to make it clear that Congress did not intend to prohibit attorneys, solicitors, and proctors, representing individuals in the courts of the United States, from charging and receiving, in addition to taxable fees and allowances, such compensation as was reasonable under local usage, or such as was agreed upon between them and their clients. But to prevent the application of that rule to the United States, the words "other than the government" were inserted. The introduction of those words, in that clause, emphasizes the purpose not to subject the United States to any system for compensating District Attorneys except that expressly established by Congress, and, therefore, to withhold from them any compensation for extra or special services, rendered in their official capacity, which is not expressly authorized by statute. Whatever legal services were rendered or offered to be rendered by the plaintiff in the McDonald suit were rendered or offered to be rendered by him as United States District Attorney, and in that capacity alone. As such officer he is not entitled to demand compensation for the services so rendered or offered to be rendered.

What we have said is a sufficient answer to the questions certified, and requires an affirmance of the judgment.

Affirmed.

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GARDNER v. MICHIGAN CENTRAL RAILROAD COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

No. 72. Argued November 7, 1893. — Decided November 27, 1893.

Plaintiff sued defendant in a Circuit Court of the State of Michigan on the cause of action for which this suit is brought. Verdict and judgment were in plaintiff's favor in the trial court. This judgment was reversed by the Supreme Court of the State, and a new trial was ordered. When the case was remanded plaintiff voluntarily withdrew his action and submitted to a nonsuit which was not to prevent his right to bring any suit in any court. He then commenced this action in the Circuit Court of the United States. The defendant contended (1) that plaintiff was estopped from bringing this action by the judgment in the state court; (2) that the record showed no negligence on the part of the defendant, and that a verdict should have been directed in its favor. The Circuit Court overruled the first contention of the defendant, but accepted the second, and directed a verdict for defendant. *Held*,

(1) That the plaintiff was not estopped from bringing this action by the proceedings and judgment in the state court;

(2) That the evidence in regard to negligence was conflicting, and the question should have been left to the jury under proper instructions.

The question of negligence in such case is one of law for the court, only when the facts are such that all reasonable men must draw the same conclusion from them: or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish.

This was an action brought in the Circuit Court of the United States for the Western District of Michigan by Frederick Gardner, a citizen of the State of Indiana, against the Michigan Central Railroad Company, a corporation of the State of Michigan, to recover damages for injuries alleged to have been inflicted by reason of the negligence of the defendant in causing, and allowing to remain for some time prior to the accident complained of, a hole in the planking of the cross-

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ing of a thoroughfare near its station house in Niles, Michigan, known as Fifth Street, contrary to its duty in that behalf, whereby the plaintiff was injured without negligence on his part; and, also, in ordering the plaintiff, who was a night switchman at that station, to do certain coupling and uncoupling of cars, out of the line of his employment as switchman and more dangerous.

Upon the trial before the District Judge, the evidence tended to show that Fifth Street in the city of Niles crossed the defendant company's tracks, of which at this crossing there were, besides the main track, several others, occupying a large portion of defendant's right of way; that the defendant's station house, freight house, and other depot buildings were located at this point; that thirty-two feet of the crossing were planked between the tracks by the defendant; that near the southeast corner of the planking, and about twelve or fifteen feet therefrom, stood a switch, which moved the track south, in adjusting it for the passage of trains; and that a month or so before the injury to the plaintiff, a car wheel had struck the end of a plank next to the rail of the track, by reason of the switch not being properly adjusted, making a hole in the surface several inches in length and width; that it was the duty of the yardmaster and roadmaster of defendant to keep the roadbed and crossings in good condition and repair; that the yardmaster must have known of the fracture of the plank; and that other employés had actual knowledge of its existence, but that plaintiff, who worked only during the night, had not been informed and did not know thereof. The yardmaster testified that he did not remember "seeing any bad spots" in the planking; "not to amount to anything;" "there might have been a car off and the ends of the plank broke down a little; there might have been, but nothing that I would think would be dangerous."

The evidence further tended to show that the yardmaster of the company had the control and management of the switches and of the work belonging to the "making up trains;" that in 1881 he employed the plaintiff to tend switches at night; that prior to March, 1882, he had ordered

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him not to engage in the work known as making up trains, which included coupling and uncoupling cars, and afterwards and prior to May 16, 1882, the supply of help for making up trains in the morning not being equal to the demand, he required the plaintiff to assist in such making up, including coupling and uncoupling. It appeared that the yard at night was in charge of a yard foreman or assistant yardmaster, and the evidence tended to show that on the 16th of May the plaintiff, acting in obedience to the orders of such assistant yardmaster, attempted to uncouple cars just before he received his injury, the hole in question being hidden under the car being uncoupled; that there was a down grade sloping west at the place where the plaintiff was, and the cars, according to necessity and general usage, were in slight motion at the time, and that as the plaintiff was stepping out from between the cars one of his feet was firmly caught in the hole, and the injuries inflicted in consequence.

On the trial of the cause it appeared that the plaintiff had originally commenced suit in the circuit court for the county of Berrien, Michigan, and that the cause had there been tried and resulted in a verdict and judgment in favor of the plaintiff, whereupon the defendant brought error to the Supreme Court of the State, which reversed the judgment and granted a new trial, and counsel for defendant gave in evidence the printed record used in said Supreme Court, together with a copy of the opinion of that court in the premises, and also a certified copy of the judgment in the state circuit court in obedience to the mandate of the Supreme Court, and it was agreed by the parties that, on the filing of its opinion, the Supreme Court entered judgment in the usual form, reversing the judgment of the court below and granting a new trial in the suit. The judgment of the state circuit court recited that, upon the filing of a certified copy of the judgment of the Supreme Court reversing the prior judgment and vacating the verdict of the jury, and the placing of the cause upon the calendar for trial, the plaintiff came by his counsel and voluntarily withdrew his suit, and submitted to a nonsuit therein, wherefore, "on motion of said plaintiff, by his said attorneys, it is

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ordered by the court, now here, that the said plaintiff be, and is hereby, nonsuited, but not to prevent the right of the plaintiff to bring any suit in any court," and for costs in favor of defendant. The opinion of the Supreme Court is reported in 58 Michigan, 584.

The headnotes are as follows:

"A switchman who had been strictly cautioned against having anything to do with coupling cars tried to uncouple some while the train was moving, and had his foot caught where the planking had been for some time slightly broken, though the defect had not been seen by him as yardman and the railroad company had no notice of it. *Held*, that he could not recover for the injury resulting to him.

"2. A railroad employé takes the ordinary risks of the work for which he hires; and if the company has used proper diligence in choosing competent servants it is not liable in damages for an injury to one of them caused by the carelessness of another."

The case in the Circuit Court having gone to the jury resulted in a verdict in plaintiff's favor, and a motion for new trial was made by defendant, which was heard before the Circuit and District Judges. The Circuit Judge was of opinion that upon the record there was no negligence on the part of the company, and that the case should have been withdrawn from the jury and a verdict directed for the defendant. The District Judge thought otherwise, but a new trial was granted, and the case being retried upon the same evidence, the District Judge, accepting in that regard the views of the Circuit Judge, instructed the jury to find for the defendant, which was done, and judgment having been entered, the cause was brought to this court by writ of error.

Mr. Edward Bacon for plaintiff in error.

Mr. Ashley Pond for defendant in error.

On behalf of the defendant in error I contend and submit: (1) That the ruling of the Circuit Judge that, under the circumstances, the judgment of the Supreme Court of the State

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constituted a perfect defence to the action, is correct, and that the judgment below must, for that reason, be affirmed; and (2) that, irrespective of the effect of the judgment of the Supreme Court of the State, the plaintiff was not entitled to recover upon the facts which the evidence tended to prove, and hence, for that reason, there was no error in withdrawing the case from the jury, and the judgment below must be affirmed.

I. Let it be understood at the outset that I do not contend that the judgment of the Supreme Court of the State, resulting as it did in the order for a new trial of the action in the circuit court of the State, and followed as it was by a discontinuance of that action, operated to bar the plaintiff from bringing, in another court, or, indeed, in the same court, another action against the defendant to recover damages on account of the injury he suffered by the accident described in his said action in the state court.

What I do contend is that the said judgment of the state Supreme Court precludes the plaintiff from successfully maintaining a new action against the defendant upon evidence tending to prove only the same state of facts which the evidence before the Supreme Court of the State tended to prove. "It is an undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties." Per Field, J., in *Russell* v. *Place*, 94 U. S. 606, 608.

It is certain that the state Supreme Court considered and determined the question which arose between the parties. It is true that the formal order, as entered, does not upon its face show that such question was determined. But that fact was properly shown by the opinion of the court which was introduced in evidence. That evidence *aliunde* the record was admissible for that purpose is settled by the authorities. *Russell* v. *Place*, 94 U. S. 606; *Campbell* v. *Rankin*, 99 U. S. 261; *Wilson's Executor* v. *Deen*, 121 U. S. 525. The statute required the opinion to be filed. 2 Howell's Annotated Stats. Mich. § 6426.

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And it is beyond question, I submit, that such determination, and the order of said court as the result of such determination, constitute a judgment within the strict legal signification of that term.

I am not unaware of the fact that, in the opinion of Justice Miller, in the case of *Bucher* v. *Cheshire Railroad*, 125 U. S. 555, 578, there is a dictum which, at first blush, appears to be adverse to the position for which I am contending; but I think an examination of that case will show that what is there said has no application here. It will be found that the statement that there had been no judgment rendered in the state court is literally true. A verdict had been rendered in the case, but no judgment had been entered thereon. Upon the trial certain exceptions to rulings of the trial judge had been taken, and these were the subject of review by the same court sitting in banc, and, such exceptions being sustained, a new trial was ordered. The situation was exactly the same as it would have been had a motion for a new trial been made and heard before the trial judge upon allegations of error in his rulings, and he had granted a new trial.

II. Assuming that the order of the superior was as the plaintiff construes it, the case was this: The plaintiff was employed as a switchman. So far as the record shows — and unquestionably such was the fact — he was not employed for any specified time. He was at liberty to quit the employment whenever he chose, and the company was at liberty to discharge him at any time. Now, the order which he says he received was not to go outside of his employment for a particular occasion and to perform a single act, but it was an order in the nature of an enlargement of his duties, and when he assented to obey the order he assented that his duties should be so enlarged, and the work he afterwards did was within and not outside of the line of his duties.

Leary v. *Boston & Albany Railroad*, 139 Mass. 580, squarely sustains this proposition. The case was this: A person of full age and ordinary intelligence entered the employ of a railroad corporation as a freight truckman, loading and unloading cars in its yard and shifting freight in its freight

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houses. After working in this capacity about three years, he was directed to perform, in addition to his regular duties, those of a fireman, from one to three hours a day, upon an engine which was used to shift freight cars in the yard, where there were many tracks, sidings, frogs, and switches, and to make up trains. He had acted as such fireman about twenty times, when, while standing on the foot-board of the engine, with his back towards the direction in which it was moving, and waiting for its speed to slacken so that he could get off, he was jolted off and injured. He had been brought up on a farm, and had ridden but six times in railroad cars. It was held that the injury was caused by one of the risks assumed by him in his employment, and that the action could not be maintained. The second paragraph of the *syllabus* reads as follows: "If a servant, of full age and ordinary intelligence, upon being required by his master to perform other duties more dangerous and complicated than those embraced in his original hiring, undertakes the same, knowing their dangerous character, although unwillingly and from fear of losing his employment, and is injured by reason of his ignorance and inexperience, he cannot maintain an action against the master for such injury."

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

Counsel for plaintiff in error does not contend that the judgment of the Supreme Court of Michigan operated as a bar to this action, but he insists that that judgment precluded "the plaintiff from successfully maintaining a new action against the defendant, upon evidence tending to prove only the same state of facts which the evidence before the Supreme Court of the State tended to prove." This assumes a final adjudication on matter of law, binding between the parties, and, treating the judgment reversing and remanding the cause as final, applies it as an estoppel, notwithstanding the fact that a nonsuit was subsequently taken. We cannot concur in this view, and are of opinion that the Circuit Court was not obliged to give any such effect to the proceedings in the state court, nor

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do we think that the Supreme Court of Michigan committed itself to the definite rulings supposed.

In *Manhattan Life Insurance Co.* v. *Broughton*, 109 U. S. 121, an action had been brought upon a life insurance policy in the state court and a nonsuit had been granted on the defendant's motion. A new action was subsequently instituted in the Circuit Court of the United States for the Southern District of New York, and upon the trial the court was requested to direct a verdict for the defendant, because the former judgment was a bar, and the defendant afterwards objected to the introduction, by the plaintiff, of certain evidence, because the question to which the evidence related had been tried and determined in the former action. The court denied the request and overruled the objection, and upon error to this court it was held that these rulings were correct; that a judgment of nonsuit did not determine the rights of the parties and was no bar to a new action; and, that "a trial upon which nothing was determined cannot support a plea of *res judicata*, or have any weight as evidence at another trial." *Homer* v. *Brown*, 16 How. 354, 366, was cited, in which it was held upon a writ of right for the recovery of certain property that "a judgment of *non pros.* given by a state court in a case between the same parties, for the same property, was not a sufficient plea in bar to prevent a recovery under a writ of right; nor was the agreement of the plaintiff to submit his case to that court upon a statement of facts, sufficient to prevent his recovery in the Circuit Court." Mr. Justice Wayne, delivering the opinion of the court, among other things, said: "The court was also asked to instruct the jury that the demandant was estopped from prosecuting this action by his agreement in his previous suit to submit it upon a statement of facts. In every view which can be taken of an estoppel, that agreement cannot be such here, because the demandant does not make in this case any denial of a fact admitted by him in that case. He rests his title here to the demanded premises upon the same proofs which were then agreed by him to be facts. This he has a right to do. His agreement only estopped him from denying that he had submitted him-

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self to be nonsuited, or that he was not liable to its consequences."

In *Bucher* v. *Cheshire Railroad*, 125 U. S. 555, 578, the plaintiff had sued in the state court and recovered judgment, and the highest appellate court of the State, reviewing the case, decided the points of law involved in it against the plaintiff, set aside the judgment, and sent the case back for a new trial. The plaintiff then became nonsuit, and brought suit in the United States court on the same cause of action, and it was held that he was not estopped. The action was one for damages for personal injuries inflicted by reason of the defendant's negligence, and one of the defences was that plaintiff was travelling on Sunday in violation of statute. The Circuit Court refused to submit to the jury the evidence upon the question of whether or not his act of travelling on the Lord's Day was a work of necessity or charity under the statute of Massachusetts in that behalf, and this court sustained the ruling, for the reasons given by Mr. Justice Miller, who said: "It is not a matter of estoppel which bound the parties in the court below, because there was no judgment entered in the case in which the ruling of the state court was made, and we do not place the correctness of the determination of the Circuit Court in refusing to permit this question to go to the jury upon the ground that it was a point decided between the parties, and, therefore, *res judicata* as between them in the present action, but upon the ground that the Supreme Court of the State in its decision, had given such a construction to the meaning of the words 'charity' and 'necessity' in the statute, as to clearly show that the evidence offered upon that subject was not sufficient to prove that the plaintiff was travelling for either of those purposes." This court felt itself constrained to follow the decision of the Supreme Judicial Court of Massachusetts, in accordance with the rule that the decisions of state courts relating to laws of a local character, which may have become established by those courts, or had always been a part of the law of the State, are usually conclusive and always entitled to the highest respect of the Federal courts.

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But in the present case only the responsibility of a railroad company to its employés was involved, and it is settled that that question is matter of general law, and that, in the absence of statutory regulations by the State in which this cause of action arises, this court is not required to follow the decisions of the state courts. *Railroad Co.* v. *Lockwood*, 17 Wall. 357; *Hough* v. *Railway Co.*, 100 U. S. 213; *Myrick* v. *Michigan Central Railroad*, 107 U. S. 102; *Lake Shore &c. Railway* v. *Prentice*, 147 U. S. 101; *Baltimore & Ohio Railroad* v. *Baugh*, 149 U. S. 368.

Apart from this, while it is true that it was apparently ruled in the opinion of the Supreme Court of Michigan, not only that upon the record as it was before that court plaintiff was guilty of contributory negligence, but also that the defendant was free from negligence since that of which plaintiff complained was the negligence of a fellow-servant, yet an analysis of the language used satisfies us of the correctness of the statement in the principal opinion in *Van Dusen* v. *Letellier*, 78 Michigan, 492, 505, that the case was really decided "upon the ground that the plaintiff was injured in going into a place and at work in violation of orders not to do so," which might or might not appear to be so upon a retrial, and upon which the evidence in the Circuit Court was far from being undisputed. We, therefore, conclude that the opinion of the state Supreme Court should be given only such weight as its reasoning and the respectability of the source from whence it proceeds entitles it to receive.

And here reference may properly be made to the fact that considerable differences appear to exist between the evidence on the trial under review and that exhibited in the record before the state court, differences bearing chiefly upon the question of contributory negligence. But, assuming the evidence as to the other branch of the case to have been unchanged, we are not prepared to concede that the decision of the Supreme Court of Michigan proceeded upon the proposition that defendant must necessarily be absolved from negligence because all its employés, including plaintiff, were, as matter of law, fellow-servants with those who should have

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kept the planking in good condition, as that proposition is untenable.

In *Hough* v. *Railway Company*, 100 U. S. 213, where the injury was the result of defective appliances, it was held that, to the general rule exempting the common master from liability to a servant for injuries caused by the negligence of fellow-servants, there are well-defined exceptions, one of which arises from the obligation of the master not to expose the servant when conducting his business to perils, from which they may be guarded by proper diligence on his part. While it is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation, among which are the carelessness of his fellow-servants with whose habits, conduct, and capacity he has in the course of his duty an opportunity to become acquainted, and against whose neglect and incompetency he may himself take precautions, it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business, and that he shall not be wanting in proper care in selecting such means. The master is not to be held as guaranteeing or warranting the absolute safety under all circumstances or the perfection of the machinery or apparatus which may be provided for the use of employés, but he is bound to exercise the care which the exigency reasonably demands in furnishing such as is adequate and suitable, and in keeping and maintaining them in such condition as to be reasonably safe for use.

These principles are reiterated in very many authorities, and among them in *Snow* v. *Housatonic Railroad*, 8 Allen, 441, referred to with approval by the Supreme Court of Michigan in this case, and much in point. It was there ruled that a railroad company may be held liable for an injury to one of its servants, which is caused by want of repair in the roadbed of the railroad, and that, if it is the duty of a servant to uncouple the cars of a train, and this cannot be easily done while the train is still, and he endeavors to uncouple them while the train is in motion, and steps between the cars and meets with

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an injury which is caused by want of repair to the roadbed, the court cannot rule, as a matter of law, that he is careless, but should submit the case to the jury, although he continued in the employment of the company after he knew of the defect. The proximate cause of the injury was a hole in one of the planks laid down between the rails of the defendant's railroad where it crossed the highway, which had existed for more than two months, to the knowledge of the plaintiff, who had complained of it to the repairer of the tracks of the railroad. The Supreme Judicial Court of Massachusetts held that the defendant was not relieved of its liability to the plaintiff by reason of any relation which subsisted between him and it at the time of the accident arising out of the employment in which he was engaged, because, among other reasons, it did not appear that the defect in the road was the result of any such negligence in the servant as to excuse the defendant, but was caused by a want of repair in the superstructure between the tracks of the defendant's road, which defendant was bound to keep in a suitable and safe condition so that plaintiff could pass over it without incurring the risk of injury. The liability was rested on the implied obligation of the master, under his contract with those whom he employs, to use due care in supplying and maintaining suitable instrumentalities for the performance of the work or duty which he requires of them, and renders him liable for damages occasioned by a neglect or omission to fulfil this obligation, whether it arises from his own want of care or that of his agents to whom he entrusts the duty.

We regarded this doctrine as so well settled that in *Texas & Pacific Railway* v. *Cox*, 145 U. S. 593, 607, we contented ourselves, without discussion, with a reference to some of the cases in this court upon the subject. The decisions in the State of Michigan are to the same effect. *Van Dusen* v. *Letellier*, 78 Michigan, 492; *Sadowski* v. *Michigan Car Company*, 84 Michigan, 100; *Roux* v. *Blodgett & Davis Lumber Co.*, 85 Michigan, 519; *Ashman* v. *Flint & Père Marquette Railroad*, 90 Michigan, 567. Upon the whole, we see no ground for excepting this case from the rules governing other cases involving questions of fact.

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Syllabus.

The question of negligence is one of law for the court only where the facts are such that all reasonable men must draw the same conclusion from them, or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish. *Railway Company* v. *Ives*, 144 U. S. 408, 417; *Railway Company* v. *Cox*, 145 U. S. 593, 606; *Railroad Company* v. *Miller*, 25 Michigan, 274; *Sadowski* v. *Car Company*, 84 Michigan, 100.

Tested by this rule we are of opinion that the case should have been left to the jury under proper instructions, inasmuch as an examination of the record discloses that there was evidence tending to show that the crossing was in an unsafe condition; that the injury happened in consequence; that the defect was occasioned under such circumstances, and was such in itself, that its existence must have been known to defendant; that sufficient time for repairs had elapsed; and that the plaintiff was acting in obedience to orders in uncoupling at the place and time, and as he was; was ignorant of the special peril; and was in the exercise of due care.

The judgment is reversed, and the cause remanded with a direction to grant a new trial.

Mr. Justice Field did not hear the argument and took no part in the consideration or decision of this case.

EUSTIS v. BOLLES.

ERROR TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

No. 74. Argued November 9, 10, 1893. — Decided November 20, 1893.

The decision by the Supreme Judicial Court of Massachusetts that a creditor of an insolvent debtor, who proves his debt in insolvency, and accepts the benefit of proceedings under the state statute of May 13, 1884, entitled "An act to provide for composition with creditors in

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Statement of the Case.

insolvency," Mass. Stats. 1884, c. 236, and the act amending the same, thereby waives any right which he might otherwise have had to object to the validity of the composition statutes, as impairing the obligation of contracts, presents no Federal question for review by this court.

To give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment, as rendered, could not have been given without deciding it.

Where the record discloses that, if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment.

When this court, in a case brought here by writ of error to a state court, finds it unnecessary to decide any Federal question, its logical course is to dismiss the writ of error.

On February 14, 1887, Charles H. Bolles and George F. Wilde, as surviving members of the firm of B. Collender & Company, filed a petition in insolvency in the insolvency court within and for the county of Suffolk, State of Massachusetts. On February 16, 1887, they filed in the same insolvency court a written proposal for composition with their copartnership creditors, under the so-called "composition acts" of 1884 and 1885, and they therein proposed to pay fifty cents on the dollar of their debts in money. On February 24, 1887, the first meetings of creditors were held in both the ordinary insolvency proceedings which were begun on February 14, and in the composition proceedings which were begun on February 16, and William T. Eustis proved a claim on a promissory note for $16,000, dated January 1, 1880, and due on demand, and voted for assignees in the ordinary insolvency proceeding; but the record does not show that he proved his claim in the composition proceedings. On March 10, 1887, an adjourned hearing in the composition proceedings was held in the insolvency court, to determine whether said proposal for composition should be confirmed; and Eustis appeared by counsel at said hearing and opposed the confirmation of said

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proposal and the granting of a discharge to said Bolles and Wilde, on the ground that the said composition acts were unconstitutional and void. Eustis also filed written objections to the discharge of the debtors, alleging that the composition acts, having been passed after the execution and delivery of the note held by Eustis, were in violation of that part of the Constitution of the United States which forbids any State to pass a law impairing the obligation of contracts.

Bolles and Wilde, having filed in the insolvency court the written assent of a majority in number and value of their creditors who had proved their claims, and having deposited in court one-half the aggregate amount of their debts, were granted by the court, on March 31, 1887, certificates of discharge under and in pursuance of the composition acts. On May 14, 1887, Eustis received the sum of $8020, being one-half the amount of his claim, and signed a receipt therefor, reciting that it was "according to the composition confirmed by the court in the case." All the other creditors of said Bolles and Wilde accepted the offer, and signed similar receipts.

Subsequently, in July, 1887, Eustis brought an action in the Supreme Judicial Court against Bolles and Wilde, wherein he sought to recover the balance of his note remaining unpaid after the receipt of the one-half received under the insolvency proceedings. The defendants pleaded the proceedings in insolvency, their offer of composition, its acceptance by the majority in number and value of their creditors, their discharge, and the acceptance by Eustis of the amount coming to him under the offer of composition, and to this answer the plaintiff demurred. Subsequently the death of William T. Eustis was suggested, and Isabel B. Eustis and Florence D. Eustis were permitted to appear and prosecute said action as executrices.

The trial court, which overruled the demurrer, made a finding of facts, and reported the case for the determination of the full court. The Supreme Judicial Court was of opinion that Eustis, by accepting the benefit of the composition, had waived any right that he might otherwise have had to object

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to the validity of the composition statutes as impairing the obligation of contracts. 146 Mass. 413. Final judgment was entered for the defendants on November 26, 1889, and on January 29, 1890, a writ of error was allowed by the Chief Justice of the Supreme Judicial Court to this court.

Mr. Conrad Reno, (with whom was *Mr. William A. Macleod* on the brief,) for plaintiffs in error.

I. This court has jurisdiction. The question of Federal law was specially set up or claimed by the original plaintiff in the proper way and at the right time. When a state court of last resort justifies its refusal, neglect or failure to decide in favor of a Federal right, title, privilege, or immunity which is specially set up or claimed in the proper way and at the right time, by the application of some general rule of law to the facts of the case, such as waiver, estoppel, or acquiescence, its judgment is reviewable by this court on writ of error. If, in the opinion of this court, the justification assigned by the state court is well grounded, the state judgment will be affirmed. But if, in the opinion of this court, the justification is not well grounded, the aggrieved party is entitled to the benefit of the Federal law, and the state judgment will be reversed if a correct decision of the Federal question requires such reversal. *Given* v. *Wright*, 117 U. S. 648, 655–656; *Huntington* v. *Attrill*, 146 U. S. 657; *Des Moines Navigation Co.* v. *Iowa Homestead Co.*, 123 U. S. 552; *Green* v. *Van Buskirk*, 5 Wall. 307, and 7 Wall. 139; *Railroad Co.* v. *Koontz*, 104 U. S. 5; *Renaud* v. *Abbott*, 116 U. S. 277; *Chapman* v. *Goodnow*, 123 U. S. 540, 548.

II. A creditor whose demand is saved from the operation of a state statute or of a state decree by the Constitution of the United States does not waive the benefit of this constitutional immunity by accepting the part of his demand which the state statute or decree says shall constitute full satisfaction; and, there being no other defence, he is entitled to recover the unpaid balance of the debt. *Embry* v. *Palmer*, 107 U. S. 3; *Kimberly* v. *Ely*, 6 Pick. 440; *Montague* v. *Massey*, 76 Vir-

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ginia, 307; *Woodbridge* v. *Wright*, 3 Connecticut, 523; *Douglass* v. *Craig*, 13 S. C. 371. See also *Insurance Co.* v. *Morse*, 20 Wall. 445 (reversing *Morse* v. *Home Ins. Co.*, 30 Wisconsin, 496); *Barron* v. *Burnside*, 121 U. S. 186; *Railroad Company* v. *Maryland*, 21 Wall. 456.

It appears that, during the entire pendency of the composition proceedings, the plaintiff's whole course of conduct was one of opposition and protest. He declined to accept the offer when first made, and he opposed the granting of the discharges. It was not until after the court had granted certificates of discharge that the plaintiff accepted a dividend.

It is well settled that a creditor who accepts the amount of a judgment or decree for less than he claims to be due is not thereby estopped to show that the judgment or decree is erroneous or void; nor does he thereby waive any of his former rights. *Erwin* v. *Lowry*, 7 How. 172, 183–184; *Planters' Bank* v. *Union Bank*, 16 Wall. 483, 497; *Reynes* v. *Dumont*, 130 U. S. 354; *Bowers* v. *Hammond*, 139 Mass. 360; *Catlin* v. *Wheeler*, 49 Wisconsin, 507; *Morriss* v. *Garland*, 78 Virginia, 215, 234; *Chicago & Eastern Illinois Railway* v. *Kamman*, 119 Illinois, 362.

III. The composition acts so affected the plaintiff's remedy as it subsisted in the State when and where the contract was made and where it was to be performed, as substantially to impair and lessen the value of the contract; and, therefore, they impair the obligation of the contract in suit and are void. *Edwards* v. *Kearzey*, 96 U. S. 595; *Bronson* v. *Kinzie*, 1 How. 311, 317; *Curran* v. *Arkansas*, 15 How. 304, 309–310; *Hawthorne* v. *Calef*, 2 Wall. 10; *Von Hoffman* v. *Quincy*, 4 Wall. 535, 553; *Walker* v. *Whitehead*, 16 Wall. 314; *Louisiana* v. *New Orleans*, 102 U. S. 203, 206; *Hartman* v. *Greenhow*, 102 U. S. 672; *Matter of Wendell*, 19 Johns. 153.

The single defence to this action is the defendants' discharge under and pursuant to the "composition acts" of Massachusetts, being Acts of 1884, 195, c. 236, and Acts of 1885, 811, c. 353. The single reply of the plaintiffs is that the composition acts are unconstitutional and void, chiefly on the ground that they impair the obligation of the contract in suit.

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Opinion of the Court.

A subsequent statute, giving greater facilities to the debtor in obtaining his discharge in an insolvency court than were given him by the law in force when and where the contract was made, or which authorizes a discharge from a preëxisting contract, in a case where such a discharge could not previously have been granted, impairs the obligation of the contract, and is unconstitutional and void; and a discharge obtained under such a statute is no defence to an action on the claim. *Matter of Wendell*, 19 Johns. 153; *Salters* v. *Tobias*, 3 Paige, 338, 344; *Wyman* v. *Mitchell*, 1 Cowen, 316; *Bryar* v. *Willcocks*, 3 Cowen, 159; *Hundley* v. *Chaney*, 65 California, 363.

Mr. Edwin B. Hale, (with whom was *Mr. James B. Richardson* on the brief,) for defendants in error.

Mr. Justice Shiras, after stating the case as above reported, delivered the opinion of the court.

It is settled law that, to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. *Murdock* v. *Memphis*, 20 Wall. 590; *Cook County* v. *Calumet & Chicago Canal Co.*, 138 U. S. 635.

It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment.

In *Klinger* v. *Missouri*, 13 Wall. 257, 263, this court, through Mr. Justice Bradley, said: "The rules which govern

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the action of this court in cases of this sort are well settled. Where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent ground, and it appears that the court did, in fact, base its judgment on such independent ground and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the state court based its judgment on the law raising the Federal question, and this court will then take jurisdiction."

In *Johnson* v. *Risk*, 137 U. S. 300, the record showed that, in the Supreme Court of Tennessee, two grounds of defence had been urged, one of which involved the construction of the provisions of the Federal bankrupt act of March 2, 1867, and the other the bar of the statute of limitations of the State of Tennessee; and this court held that "where, in an action pending in a state court, two grounds of defence are interposed, each broad enough to defeat a recovery, and only one of them involves a Federal question, and judgment passes for the defendant, the record must show, in order to justify a writ of error from this court, that the judgment was rested upon the disposition of the Federal question; and if this does not affirmatively appear, the writ of error will be dismissed, unless the defence which does not involve a Federal question is so palpably unfounded that it cannot be presumed to have been entertained by the state court."

Different phases of the question were presented, and the same conclusion was reached in *Murray* v. *Charleston*, 96 U. S. 432, 441; *Jenkins* v. *Lœwenthal*, 110 U. S. 222; *Hale* v. *Akers*, 132 U. S. 554.

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In this state of the law we are met, at the threshold in the present case, with the question whether the record discloses that the Supreme Judicial Court of Massachusetts decided adversely to the plaintiffs in error any claim arising under the Constitution or laws of the United States, or whether the judgment of that court was placed on another ground, not involving Federal law, and sufficient of itself to sustain the judgment.

The defendants in the trial court depended on a discharge obtained by them under regular proceedings, under the insolvency statutes of Massachusetts. This defence the plaintiffs met by alleging that the statutes, under which the defendants had procured their discharge, had been enacted after the promissory note sued on had been executed and delivered, and that, to give effect to a discharge obtained under such subsequent laws, would impair the obligation of a contract, within the meaning of the Constitution of the United States. Upon such a state of facts, it is plain that a Federal question, decisive of the case, was presented, and that if the judgment of the Supreme Judicial Court of Massachusetts adjudged that question adversely to the plaintiffs, it would be the duty of this court to consider the soundness of such a judgment.

The record, however, further discloses that William T. Eustis, represented in this court by his executors, had accepted and receipted for the money which had been awarded him, as his portion, under the insolvency proceedings, and that the court below, conceding that his cause of action could not be taken away from him, without his consent, by proceedings under statutes of insolvency passed subsequently to the vesting of his rights, held that the action of Eustis, in so accepting and receipting for his dividend in the insolvency proceedings, was a waiver of his right to object to the validity of the insolvency statutes, and that, accordingly, the defendants were entitled to the judgment.

The view of the court was that, when the composition was confirmed, Eustis was put to his election whether he would avail himself of the composition offer, or would reject it and

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rely upon his right to enforce his debt against his debtors notwithstanding their discharge.

In its discussion of this question the court below cited and claimed to follow the decision of this court in the case of *Clay* v. *Smith*, 3 Pet. 411, where it was held that the plaintiff, by proving his debt and taking a dividend under the bankrupt laws of Louisiana, waived his right to object that the law did not constitutionally apply to his debt, he being a creditor residing in another State. But in deciding that it was competent for Eustis to waive his legal rights, and that accepting his dividend under the insolvency proceedings was such a waiver, the court below did not decide a Federal question. Whether that view of the case was sound or not, it is not for us to inquire. It was broad enough, in itself, to support the final judgment, without reference to the Federal question.

The case of *Beaupré* v. *Noyes*, 138 U. S. 397, 401, seems to cover the present one. There the plaintiff in error complained that an assignment of property, not accompanied by delivery and an actual change of possession, was, as to him, fraudulent; and as his contention to that effect was denied to him, he claimed he was denied a right arising under an authority exercised under the United States. But this court said: "Whether the state court so interpreted the territorial statute as to deny such right to the plaintiffs in error, we need not inquire, for it proceeded, in part, upon another and distinct ground, not involving any Federal question, and sufficient, in itself, to maintain the judgment, without reference to that question. That ground is that there was evidence tending to show that the defendants acquiesced in and assented to all that was done, and waived any irregularity in the mode in which the assignee conducted the business; and that the question, whether the defendants so acquiesced and assented with knowledge of all the facts, and thereby waived their right to treat the assignment as fraudulent, was properly submitted to the jury. The state court evidently intended to hold that, even if the assignment was originally fraudulent, as against the creditors, by reason

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of Young," the assignor, remaining in apparent possession, "it was competent for the plaintiffs in error to waive the fraud and treat the assignment as valid. . . . That view does not involve a Federal question. Whether sound or not, we do not inquire. It is broad enough, in itself, to support the final judgment, without reference to the Federal question."

Having reached the conclusion that we are not called upon to determine any Federal question, nor to consider whether the state court was right or wrong in its decision of the other question in the case, it only remains to inquire whether that conclusion requires us to affirm the judgment of the court below, or to dismiss the writ of error. An examination of our records will show that, in similar cases, this court has sometimes affirmed the judgment of the court below, and sometimes has dismissed the writ of error. This discrepancy may have originated in a difference of views as to the precise scope of the questions presented. However that may be, we think that, when we find it unnecessary to decide any Federal question, and when the state court has based its decision on a local or state question, our logical course is to dismiss the writ of error. This was the judgment pronounced in *Klinger* v. *Missouri*, 13 Wall. 257; *N. O. Waterworks* v. *Louisiana Sugar Co.*, 125 U. S. 18; *Kreigher* v. *Shelby Railroad*, 125 U. S. 39; *De Saussure* v. *Gaillard*, 127 U. S. 216; *Hale* v. *Akers*, 132 U. S. 554; *Hopkins* v. *McLure*, 133 U. S. 380; *Johnson* v. *Risk*, 137 U. S. 300, 307; and in numerous other cases which it is unnecessary to cite.

Accordingly, our judgment is that, in the present case, the writ of error must be

Dismissed.

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HOLLINS *v.* BRIERFIELD COAL AND IRON COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

No. 29. Argued October 27, 30, 1893. — Decided November 20, 1893.

The trustee of a mortgage upon the real estate of an Alabama corporation commenced a suit in the Circuit Court of the United States for the foreclosure of the mortgage. In his bill he set up that some stockholders were liable for unpaid assessments on their stock, and, while asking for a foreclosure of the mortgage and sale of the property, he prayed that other creditors of the corporation might be permitted to intervene and become parties, and have their claims adjudicated, and that a full administration be had of the estate. About three months after the commencement of that suit, a contract creditor, who had not reduced his claim to judgment, filed his bill in equity in the same court, suing for his own benefit and that of all creditors who should become parties, asking to have the mortgage declared void, to have the property sold, and the proceeds applied to the payment of the debts of the creditors, parties to the suit, and for a liquidation. The plaintiff in the second suit did not intervene in the foreclosure suit. In due course a decree was entered in the foreclosure suit for the sale of the property. The court then entered a decree dismissing the creditor's bill upon the merits. *Held*, That this was error, and that the bill should have been dismissed for want of jurisdiction.

Simple contract creditors of a corporation, whose claims have not been reduced to judgment, and who have no express lien on its property, have no standing in a Federal court of equity, to obtain the seizure of their debtor's property, and its application to the payment of their debts.

This rule is not affected by the fact that a statute of the State in which the property is situated, and in which the suit is brought, authorizes such a proceeding in the courts of the State, because the line of demarcation between equitable and legal remedies in the Federal courts cannot be obliterated by state legislation.

This rule is not affected by the fact that when such a suit is brought in a Federal court, another suit is pending there for the foreclosure of a mortgage upon the property of the corporation.

In such case the defence that the rights of the plaintiff at law should have been exhausted before commencing proceedings in equity is a defence which must be made *in limine*, and, if not so made, the court of equity is not necessarily ousted of jurisdiction.

Neither the insolvency of a corporation, nor the execution of an illegal

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trust deed, nor the failure to collect in full all stock subscriptions, nor all together give to a simple contract creditor of the corporation any lien on its property, or charge any direct trust thereon.

Case v. *Beauregard*, 101 U. S. 688, *Sanger* v. *Upton*, 91 U. S. 56 and *Terry* v. *Anderson*, 95 U. S. 628, distinguished; and shown not to conflict with the subsequent cases of *Wabash, St. Louis & Pacific Railway* v. *Ham*, 114 U. S. 587; *Fogg* v. *Blair*, 133 U. S. 584; and *Hawkins* v. *Glenn*, 131 U. S. 319.

When a corporation becomes insolvent, the equitable interest of the stockholders in the property and their conditional liability to creditors, place the property in a condition of trust, first for creditors, and then for stockholders; but this is rather a trust in the administration of the assets after possession by a court of equity, than a trust, attaching to the property, as such, for the direct benefit of either creditor or stockholder.

THE facts in this case were as follows: The Brierfield Coal and Iron Company was incorporated under the laws of Alabama, May 4, 1882. On September 1, 1882, a conveyance was made by the company to Preston B. Plumb, as trustee, to secure an issue of $500,000 in bonds. On July 25, 1887, the trustee, Plumb, requested a further conveyance and assurance, pursuant to a covenant in the deed of September, 1882, which further conveyance was executed by the company on July 29, 1887. On August 1 he demanded the surrender of all the company's property to him, as trustee. This was done, and he placed John G. Murray in charge to control and manage it. On August 3 he filed a bill in the Circuit Court of the United States for the Middle District of Alabama, against the company, joining as defendants certain stockholders, bondholders, and creditors, though not the plaintiffs in the present suit. That bill set out the organization of the corporation, the stockholders, with the amounts of stock subscribed, and the amounts paid upon such stock, and alleged that the subscribers were liable for the unpaid subscriptions, but that the assistance of the court was necessary for the assessment of such sums. It also set out the issue of the bonds, and their present owners so far as known, a default in the payment of the interest due thereon, the property and indebtedness of the company, the unsecured indebtedness being alleged to amount to about $200,000. The bill further averred that up

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to that time the chief industry of the company had been the manufacturing of cut nails from iron; that owing to overproduction in the country this business had become unprofitable to the company, and that it was desired to change the industry from the manufacture of nails to the production of pig iron, and that it had purchased property with a view to carrying on that industry; that it did not have money enough to successfully carry it on. The bill also alleged that the trustee had taken possession, as authorized by the deed of trust; that he could not carry on the business of the company without obtaining money on the credit of the property; and prayed the direction of the court as to whether he should be permitted to borrow such money, and issue certificates of indebtedness therefor. It asked that all creditors of the corporation and claimants against the estate be permitted to make themselves parties and have their claims adjudicated; that a full administration be had of the estate, and, if need be, a foreclosure and sale. Subsequently, Plumb resigned as trustee, and W. L. Chambers was substituted in his place. Proceedings were had in that case, which resulted, on July 8, 1889, in a decree for the foreclosure of the trust deed and a sale of the property. Nearly three months after the commencement of the Plumb suit, and on October 28, 1887, these appellants, as plaintiffs, filed a bill in the same court, making the coal company and sundry stock and bondholders, together with the trustee Plumb, parties defendant. The plaintiffs were unsecured creditors of the company, having claims contracted in 1886 and 1887, four or five years after the issue of the bonds and execution of the trust deed, who sued on behalf of themselves and all other creditors of the coal and iron company, who were willing to come in and contribute to the expenses of the suit. After setting forth their claims, they alleged that the conveyance to Plumb, as trustee, was absolutely void; that a large amount was still due on the stock; they asked to have a receiver appointed, and the property sold in satisfaction of their claims; and that such receiver have authority to collect the unpaid stock subscriptions, to be also applied in satisfaction of their claims. They alleged the pendency of

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the suit brought by Plumb as trustee, but did not ask to intervene therein. After the decree of foreclosure and sale in the Plumb case, and on July 24, 1889, a final decree was entered dismissing this bill. From such decree of dismissal plaintiffs appealed to this court.

Mr. Alexander T. London for appellants.

This bill was filed on the well-established principle that the assets of a corporation, including unpaid stock subscriptions, are a trust fund for the benefit of corporate creditors, upon which they have a lien in equity, and that the directors have no power to waste or dispose of this trust fund.

This doctrine was said by Mr. Justice Miller, for this court, in *Sawyer* v. *Hoag*, 17 Wall. 610, 620, to be then of modern date. It has since been so often reiterated and affirmed in this court that I shall content myself with quoting it from the opinion in *Sanger* v. *Upton*, 91 U. S. 56, 60, and the citation of a few of the authorities.

In this case Mr. Justice Swayne, for this court, states the rule with great force and clearness. He says: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation, for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors, there is no

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distinction between such a demand and any other asset which may form a part of the property and effects of the corporation." See also *Upton* v. *Tribilcock*, 91 U. S. 45; *Scovill* v. *Thayer*, 105 U. S. 143, 150; *Handley* v. *Stutz*, 139 U. S. 417, 427; *Fogg* v. *Blair*, 139 U. S. 118.

This doctrine is fully recognized in Alabama. *Bank of St. Mary's* v. *St. John*, 25 Alabama, 566; *Smith* v. *Huckabee*, 53 Alabama, 191; *Montgomery & West Point Railroad* v. *Branch*, 59 Alabama, 139.

Where a corporation has wrongfully disposed of its assets or is wasting them, or is insolvent, or where there has been a practical dissolution, a creditor at large of the corporation may maintain a bill to enforce his lien upon the assets and have a receiver appointed to protect the trust fund. *Bank of St. Mary's* v. *St. John*, 25 Alabama, 566; *Conro* v. *Gray*, 4 How. Pr. 166; *Fisk* v. *Union Pacific Railroad*, 10 Blatchford, 518; *St. Louis & Sandoval Coal Co.* v. *Edwards*, 103 Illinois, 472; *Evans* v. *Coventry*, 5 De G., M. & G. 911; *Kearns* v. *Leaf*, 1 Hem. & Mill. 681; *Re State Fire Ins. Co.*, 2 Hem. & Mill. 457; *Sanger* v. *Upton*, 91 U. S. 56; *Terry* v. *Tubman*, 92 U. S. 156; *Terry* v. *Anderson*, 95 U. S. 628; *Mellen* v. *Moline Iron Works*, 131 U. S. 352.

The learned counsel for appellees insist that there is no equity shown in the bill, and apart from the merits, the Circuit Court had no jurisdiction to entertain the bill, because the complainants were creditors at large and failed to allege the exhaustion of legal remedies; and he relies upon *Taylor* v. *Bowker*, 111 U. S. 110; *Scott* v. *Neely*, 140 U. S. 106; *National Tube Works* v. *Ballou*, 146 U. S. 517.

Since that brief was filed decisions have been handed down in this court in the cases of *Cates* v. *Allen*, 149 U. S. 451, and *Swan Land & Cattle Company* v. *Frank*, 148 U. S. 603; and I presume these cases will be relied upon, so I shall consider them all and endeavor to state as clearly as I can, what I conceive to be the distinction between them and the case at bar.

The distinction between all these cases and the one at bar, in my judgment, rests on the following propositions, which are sustained by the highest authority:

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Argument for Appellants.

1. The capital stock and assets of a corporation constitute a trust fund pledged for the benefit of creditors, which neither the officers nor stockholders can divert or waste. 2 Story Eq. Jur. § 1252; *Wood* v. *Dummer*, 3 Mason, 308; *Sawyer* v. *Hoag*, 17 Wall. 610; *Sanger* v. *Upton*, 91 U. S. 56; *Upton* v. *Tribilcock*, 91 U. S. 45; *Scovill* v. *Thayer*, 105 U. S. 143; 2 Mor. on Corp. § 780 *et seq.*

This principle, which was first declared in *Wood* v. *Dummer*, *supra*, has long been recognized in this State, as elsewhere, and repeatedly affirmed. *Bank of St. Mary's* v. *St. John*, 25 Alabama, 566; *Smith* v. *Huckabee*, 53 Alabama, 191; *Montgomery & West Point Railroad* v. *Branch*, 59 Alabama, 139; *Elyton Land Co.* v. *Birmingham Co.*, 92 Alabama, 407.

2. Following this principle, the lien of creditors on this trust fund is recognized in equity and the authorities are numerous that a corporate creditor, without judgment, may come into a court of equity, upon the insolvency or dissolution of the corporation, to protect this trust fund, thus pledged, from waste or diversion and enforce his lien. 2 Mor. on Corp. §§ 797, 798; 2 Story Eq. § 1252*a*; Perry on Trusts, § 242; *Bank of St. Mary's* v. *St. John*, 25 Alabama, 566, 618; *Conro* v. *Gray*, 4 How. Pr. 166; *St. Louis & Sandoral Coal Co.* v. *Edwards*, 103 Illinois, 472; *Evans* v. *Coventry*, 5 De G., M. & G. 911; *Kearns* v. *Leaf*, 1 Hem. & Mill. 681; *Re State Fire Ins. Co.*, 2 Hem. & Mill. 457; *Sanger* v. *Upton*, 91 U. S. 60; Beach on Receivers, 416.

3. This right of the creditors at large of a corporation to proceed in equity is in strict analogy to the right of a creditor of a partnership, and is based upon the same principle of equity. Mr. Morawetz, after declaring the rule as stated in reference to corporate creditors, says: "Similar equitable relief will for the same reasons be granted to creditors of a limited partnership, or of a joint stock company whose capital has been equitably pledged as a fund for the security of creditors." 2 Mor. on Corp. § 798.

In *Holt* v. *Bancroft*, 30 Alabama, 193, 204, the right of a partnership creditor to come into equity without first exhausting his legal remedies is expressly decided. In *Case*

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v. *Beauregard*, 101 U. S. 688, 691, a creditor at large of a partnership filed a bill to subject firm assets to his debt; on the hearing his bill was dismissed. He then filed a second bill for the same cause of action, alleging, in addition to the matters set forth in the former bill, the recovery of a judgment, the issue of an execution and return of *nulla bona*. It was held that the former decree was as *res adjudicata* a bar to the second suit. The case necessarily involved the determination of the question whether on the first bill the creditor could have had relief or not, and the court sustained the proposition that he could. In the opinion of the court, Mr. Justice Strong discusses learnedly and at length the reason of the rule requiring the creditors to exhaust their legal remedies before seeking the aid of a court of equity. He says: "But, without pursuing this subject farther, it may be said that whenever a creditor has a trust in his favor, or a lien upon the property for the debt due him, he may go into equity without exhausting legal processes or remedies. *Tappan* v. *Evans*, 11 N. H. 311; *Holt* v. *Bancroft*, 30 Alabama 193. Indeed, in those cases in which it has been held that obtaining a judgment and issuing an execution is necessary before a court of equity can be asked to set aside fraudulent dispositions of a debtor's property, the reason given is that a general creditor has no lien. And when such bills have been sustained without a judgment at law, it has been to enable the creditor to obtain a lien either by judgment or execution. But when the bill asserts a lien or a trust, and shows it can be made available by aid of a chancellor, it obviously makes a case for his interference."

The trust and lien being thus established, the jurisdiction of the court of equity to entertain a bill filed by a creditor at large to protect and subject the trust fund follows.

The debts of the complainants are admitted. The first section of the answer of the corporation is as follows: "That this defendant neither admits nor denies that it is indebted to the complainants in the amounts as alleged in said bill of complaint, but believes such indebtedness to be as therein set forth."

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An admitted debt will not alone entitle a party to invoke the aid of a court of equity, as all the cases show, but if the debt be admitted, and there is a lien or equity over which a court of equity exercises jurisdiction, then relief will be afforded, whether there be an exhaustion of legal remedies or not, wherever the bill shows on its face that any proceedings in the law court would necessarily be fruitless, as is said in *Case* v. *Beauregard*, *supra*. The principle for which I contend is expressly declared by the House of Lords in *Evans* v. *Coventry*, 5 De G., M. & G. 911; and by this court in *Mellen* v. *Moline Iron Works*, 131 U. S. 352, 357. *Sage* v. *Memphis & Little Rock Railroad*, 125 U. S. 361, 367, is also in strict analogy.

In this connection I also refer to the cases in this court in which it has been held that objection to the equity of the plaintiff's claim must be taken by demurrer or is waived: *Farley* v. *Kittson*, 120 U. S. 303, 316; *Rhode Island* v. *Massachusetts*, 14 Pet. 210, 258, 262.

And if the objection to the jurisdiction is on the ground that the plaintiff has an adequate remedy at law, it must be taken at the earliest moment, and if the defendant answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has a plain and adequate remedy at law. *Reynes* v. *Dumont*, 130 U. S. 354, 395; *Kilbourn* v. *Sunderland*, 130 U. S. 505, 514.

Mr. Daniel S. Troy filed a printed argument for appellants.

Mr. William F. Mattingly for the Brierfield Coal & Iron Company and Thomas J. Peter, appellees.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

The plaintiffs were simple contract creditors of the company; their claims had not been reduced to judgment, and they had no express lien by mortgage, trust deed, or other-

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wise. It is the settled law of this court that such creditors cannot come into a court of equity to obtain the seizure of the property of their debtor, and its application to the satisfaction of their claims; and this, notwithstanding a statute of the State may authorize such a proceeding in the courts of the State. The line of demarcation between equitable and legal remedies in the Federal courts cannot be obliterated by state legislation. *Scott* v. *Neely*, 140 U. S. 106; *Cates* v. *Allen*, 149 U. S. 451. Nor is it otherwise in case the debtor is a corporation, and an unpaid stock subscription is sought to be reached. *National Tube Works Company* v. *Ballou*, 146 U. S. 517; *Swan Land & Cattle Company* v. *Frank*, 148 U. S. 603, 612. Nor is this rule changed by the fact that the suit is brought in a court in which at the time is pending another suit for the foreclosure of a mortgage or trust deed upon the property of the debtor. Doubtless in such foreclosure suit the simple contract creditor can intervene, and if he has any equities in respect to the property, whether prior or subsequent to those of the plaintiff, can secure their determination and protection; and here, by the express language of the bill filed by the trustee, all claimants and creditors were invited to present their claims and have them adjudicated. These plaintiffs did not intervene, though, as shown by the allegations of their bill, they knew of the existence of the foreclosure suit; neither did they apply for a consolidation of the two suits. On the contrary, the whole drift and scope of their suit was adverse to that brought by the trustee, and in antagonism to the rights claimed by him. They obviously intended to keep away from that suit, and maintain, if possible, an independent proceeding to have the property of the debtor applied to the satisfaction of their claims. But this, as has been decided in the cases cited, cannot be done. The excuse suggested, that the rule which forbids in a suit to foreclose a mortgage the litigation of a title adverse to that of the mortgagor prevented them from intervening, is not sound. Their rights, like those of the trustee and the bondholders, were derived from the corporation defendant. Each claimed under it, and the validity and amount of such claims were matters properly and

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ordinarily considered and determined in a foreclosure suit. It is true the corporation might admit the validity of any or all of the claims, and then the validity could only be a subject of inquiry as between the claimants for the purpose of determining the matter of priority, but to that extent, at least, both validity and amount are always open to contest and determination.

It is urged, however, that this court has sustained the validity of proceedings and decrees in suits of this nature, in which it appeared that the plaintiffs had not exhausted their remedies at law, and the cases of *Sage* v. *Memphis & Little Rock Railroad*, 125 U. S. 361, and *Mellen* v. *Moline Iron Works*, 131 U. S. 352, are cited as illustrations. But passing by other matters disclosed by the facts of those cases, it will be noticed that in neither of them was the objection made at the outset, and when action on the part of the court was invoked. Defences existing in equity suits may be waived, just as they may in law actions, and when waived, the cases stand as though the objection never existed. Given a suit in which there is jurisdiction of the parties, in a matter within the general scope of the jurisdiction of courts of equity, and a decree rendered will be binding, although it may be apparent that defences existed which, if presented, would have resulted in a decree of dismissal. Take the present case as an illustration: Suppose the corporation and other defendants had made no defence, and, without expressly consenting, had made no objection to the appointment of a receiver, and the subsequent distribution of the assets of the corporation among its creditors; it cannot be doubted that a final decree, providing for a settlement of the affairs of the corporation and a distribution among creditors could not have been challenged on the ground of a want of jurisdiction in the court, and that notwithstanding it appeared upon the face of the bill that the plaintiffs were simple contract creditors; because the administration of the assets of an insolvent corporation is within the functions of a court of equity, and the parties being before the court, it has power to proceed with such administration. If there was a defence existing to the bills as framed, an objection to the right of these

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plaintiffs to proceed on the ground that their legal remedies had not been exhausted, it was a defence and objection which must be made *in limine*, and does not of itself oust the court of jurisdiction. This doctrine has been recognized not merely in the cases cited, but also in those of *Reynes* v. *Dumont*, 130 U. S. 354; *Kilbourn* v. *Sunderland*, 130 U. S. 505; *Brown* v. *Lake Superior Iron Co.*, 134 U. S. 530. None of these cases question the proposition that if the objection is seasonably presented it will be effective.

But it is earnestly insisted that it has been held by this court, in *Case* v. *Beauregard*, 101 U. S. 688, that whenever a creditor has a trust in his favor, or a lien upon property for a debt due him, he may go into equity without exhausting his legal remedies; that it has also frequently been affirmed that the capital stock and assets of a corporation constitute a trust fund for the benefit of its creditors, which neither the officers nor stockholders can divert or waste, and several cases are cited, among them that of *Sanger* v. *Upton*, 91 U. S. 56, in which perhaps the proposition is asserted in the most direct and emphatic language, and *Terry* v. *Anderson*, 95 U. S. 628, 636, in which Chief Justice Waite made these observations: "Ordinarily, a creditor must put his demand into judgment against his debtor and exhaust his remedies at law before he can proceed in equity to subject choses in action to its payment. To this rule, however, there are some exceptions; and we are not prepared to say that a creditor of a dissolved corporation may not, under certain circumstances, claim to be exempted from its operation. If he can, however, it is upon the ground that the assets of the corporation constitute a trust fund which will be administered by a court of equity in the absence of a trustee; the principle being that equity will not permit a trust to fail for want of a trustee."

While it is true language has been frequently used to the effect that the assets of a corporation are a trust fund held by a corporation for the benefit of creditors, this has not been to convey the idea that there is a direct and express trust attached to the property. As said in 2 Pomeroy's Equity Jurisprudence, § 1046, they "are not in any true and complete

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sense trusts, and can only be called so by way of analogy or metaphor."

To the same effect are decisions of this court. The case of *Graham* v. *Railroad Company*, 102 U. S. 148, was an action by a subsequent creditor to subject certain property, alleged to have been wrongfully conveyed by the corporation debtor, to the satisfaction of his judgment. And the very proposition here presented was then considered, and in respect to it, the court, by Mr. Justice Bradley, said (p. 160): "It is contended, however, by the appellant that a corporation debtor does not stand on the same footing as an individual debtor; that, whilst the latter has supreme dominion over his own property, a corporation is a mere trustee, holding its property for the benefit of its stockholders and creditors; and that if it fail to pursue its rights against third persons, whether arising out of fraud or otherwise, it is a breach of trust, and creditors may come into equity to compel an enforcement of the corporate duty. This, as we understand, is the substance of the position taken.

"We do not concur in this view. It is at war with the notions which we derive from the English law with regard to the nature of corporate bodies. A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but, in law, it is as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same. Its stockholders may call the officers to account, and may prevent any malversation of funds, or fraudulent disposal of property on their part. But that is done in the exercise of their corporate rights, not adverse to the corporate interests, but coincident with them.

"When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his."

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Opinion of the Court.

With reference to the suggestion in this last paragraph, it may be observed that the court does not attempt to determine who are proper parties to maintain a suit for the administration of the assets of an insolvent corporation. All that it decides is, that when a court of equity does take into its possession the assets of an insolvent corporation, it will administer them on the theory that they in equity belong to the creditors and stockholders rather than to the corporation itself. In other words, and that is the idea which underlies all these expressions in reference to "trust" in connection with the property of a corporation, the corporation is an entity, distinct from its stockholders as from its creditors. Solvent, it holds its property as any individual holds his, free from the touch of a creditor who has acquired no lien; free also from the touch of a stockholder who, though equitably interested in, has no legal right to, the property. Becoming insolvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, places the property in a condition of trust, first, for the creditors, and then for the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder.

Again, in the case of the *Wabash, St. Louis & Pacific Railway* v. *Ham*, 114 U. S. 587, it appeared that four railway corporations, owing debts, were consolidated under authority of law, and, by the terms of the consolidation agreement, the new corporation was to protect the debts of the old. Subsequently, the new corporation executed a mortgage on all its property, and in a contest between the mortgagees and the unsecured creditors of one of the constituent companies, the court held that the lien of the mortgagees was prior. In respect to this, Mr. Justice Gray (p. 594) thus stated the law: "It was contended that the property of the Toledo and Wabash Railway Company was a trust fund for all

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its creditors, and that upon the consolidation the Toledo, Wabash and Western Railway Company took the property of the Toledo and Wabash Railway Company charged with the payment of all its debts. The property of a corporation is doubtless a trust fund for the payment of its debts, in the sense, that when the corporation is lawfully dissolved and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation, as in that of a natural person, that any conveyance of property of the debtor, without authority of law, and in fraud of existing creditors, is void as against them."

The case of *Fogg* v. *Blair*, 133 U. S. 534, 541, presented a similar question, and this court, by Mr. Justice Field, observed: "We do not question the general doctrine invoked by the appellant, that the property of a railroad company is a trust fund for the payment of its debts, but do not perceive any place for its application here. That doctrine only means that the property must first be appropriated to the payment of the debts of the company, before any portion of it can be distributed to the stockholders; it does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to *bona fide* purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence."

In the case of *Hawkins* v. *Glenn*, 131 U. S. 319, 332, which was an action brought by the trustee of a corporation against certain of its stockholders to recover unpaid subscriptions, and in which the defence of the statute of limitations was pleaded, Chief Justice Fuller referred to this matter in these words: "Unpaid subscriptions are assets, but have frequently been treated by courts of equity as if impressed with a trust *sub modo*, upon the view that, the corporation being insolvent, the existence of creditors subjects these liabilities to the rules applicable to funds to be accounted for as held in trust, and that, therefore, statutes of limitation do not commence to run

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in respect to them until the retention of the money has become adverse by a refusal to pay upon due requisition."

These cases negative the idea of any direct trust or lien attaching to the property of a corporation in favor of its creditors, and at the same time are entirely consistent with those cases in which the assets of a corporation are spoken of as a trust fund, using the term in the sense that we have said it was used.

The same idea of equitable lien and trust exists to some extent in the case of partnership property. Whenever, a partnership becoming insolvent, a court of equity takes possession of its property, it recognizes the fact that in equity the partnership creditors have a right to payment out of those funds in preference to individual creditors, as well as superior to any claims of the partners themselves. And the partnership property is, therefore, sometimes said, not inaptly, to be held in trust for the partnership creditors, or, that they have an equitable lien on such property. Yet, all that is meant by such expressions is the existence of an equitable right which will be enforced whenever a court of equity, at the instance of a proper party and in a proper proceeding, has taken possession of the assets. It is never understood that there is a specific lien, or a direct trust.

A party may deal with a corporation in respect to its property in the same manner as with an individual owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien. The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud or sometimes even mere mismanagement in respect thereto; but as between itself and its creditors the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor. That is certainly the general rule, and if there be any exceptions thereto they are not presented by any of the facts in this case. Neither the insolvency of the corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor, all to-

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gether, gave to these simple contract creditors any lien upon the property of the corporation, nor charged any direct trust thereon.

With respect to the propriety of the decree of dismissal in this suit after the entry of the decree of foreclosure in the trustee suit, the case of *Stout* v. *Lye*, 103 U. S. 66, is conclusive. Indeed, that case is conclusive of every question in this, except such as arise from the fact that the debtor is a corporation rather than an individual. It appeared that, pending a foreclosure suit, J. W. and J. O. Stout obtained a judgment against the mortgagor on an unsecured claim. They thereupon instituted a suit, making both mortgagee and mortgagor parties defendant, to set aside the mortgage as illegal; or, if not illegal, to have its amount reduced by certain payments of usurious interest. While this suit was pending the foreclosure suit passed into decree, the Stouts having never been made parties or entered an appearance in that suit. Thereupon their suit was dismissed, and such dismissal was held by this court proper, on the ground that the Stouts, being simple contract creditors at the time the foreclosure suit was commenced, were not only unnecessary but improper parties. "If they had been made parties when the suit was begun, they could have done nothing by way of defence to the action until they had acquired some specific interest in the mortgaged property. As creditors at large they were powerless in respect to the foreclosure proceedings, but when they obtained their judgment, not before, they were in a position to contest in all legitimate ways the validity and extent of the superior lien which the bank asserted on the property, in which, by the judgment, they had acquired a specific interest." And on the further ground that the mortgagor represented in the foreclosure suit not merely himself, but all parties who, like the Stouts, acquired any interest in the property since the commencement of that suit.

So here these plaintiffs were simple contract creditors when the trustee's suit was commenced. That suit passed to decree of foreclosure, and up to that time these plaintiffs had acquired no specific lien upon the property. They entered no appear-

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ance in that suit; did not intervene or claim any rights in the property, and they were represented in that suit by the corporation, the party under whom both they and the trustee claimed. A decree of dismissal was, therefore, proper. It appears in the record as a decree upon the merits. It should have been for want of jurisdiction, and to that extent the decree as entered will be modified. The appellants will be charged with all the costs in the case.

Dismissed for want of jurisdiction.

MR. JUSTICE BROWN and MR. JUSTICE JACKSON dissented.

MAGIN v. KARLE.

MAGIN v. LEHMAN.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

Nos. 84, 85. Argued November 15, 16, 1893. — Decided November 27, 1893.

Letters patent 248,646, granted to Charles Gordon, October 25, 1881, for "an improved apparatus for cooling and drawing beer" are void for want of patentable novelty, and the invention patented was anticipated.

THE case is stated in the opinion.

Mr. John R. Bennett, (with whom was *Mr. George B. Selden* on the brief,) for appellant.

Mr. Josiah Sullivan for appellee.

MR. JUSTICE JACKSON delivered the opinion of the court.

These two causes present the same questions on the same state of facts. They were heard in the lower court and in this court as practically one case, and will therefore be considered

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and determined together. The suits were brought by the appellant as assignee of letters patent No. 248,646, granted to Charles Gordon, October 25, 1881, for "an improved apparatus for cooling and drawing beer," against the respective appellees for the alleged infringement of the patent. The defences interposed by the answer of each respondent were, want of patentable novelty in the invention covered by the letters patent, the anticipation thereof by certain prior devices, and non-infringement. The latter defence was not insisted on, either in the court below or in this court, the main defence relied on being that of anticipation by a prior apparatus used for the same purpose before the date of the Gordon invention. Upon this question much proof was taken on both sides.

The causes were heard before Mr. Justice Blatchford, sitting in the Circuit Court of the United States for the Northern District of New York, who found from the proof that the existence of the prior anticipating device was clearly established, and shown to have been in practical use before the Gordon invention. The court said:

"This is the same patent which was involved in the suits of *Magin* v. *McKay* and *Magin* v. *Welker*, decided by me in this court August 20, 1885, 24 Fed. Rep. 743. In the opinion in those cases, the material parts of the specification and the four claims are set forth, and the operation of the apparatus is described. It was there held that, so far as claims 1 and 4 were concerned, the invention was anticipated by an apparatus put in use by one Meinhard, in Rochester, New York, in the summer of 1877, and which was continued in use about four years. A description was given of that apparatus, and it was held, on the evidence, that it was practical and successful, and embodied the same principle as that of Gordon; that it was continued in use for nearly two years after Gordon obtained his patent; and that, although it did not contain the non-conducting jacket surrounding the outer wall of the cold-air passage, which was a feature in claim 3 of the patent, there was no patentable invention in adding a non-conducting jacket to the elements found in claim 1, or to those found in claim 4.

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Infringement of claim 2 was not alleged in those cases. The bills were dismissed on the ground of the prior existence of the Meinhard apparatus.

"In the present suits infringement is alleged in each of them of claims 1 and 4 of the Gordon patent. The testimony on both sides taken in the McKay and Welker suits in regard to the Meinhard apparatus is introduced in evidence in the present cases, and voluminous proofs in addition have been taken by both parties in regard to that apparatus.

"A careful examination of all the evidence, with the aid of exhaustive briefs for the respective parties, confirms me in the conclusion at which I arrived in the McKay and Welker cases, that the invention embodied in claims 1 and 4 of the Gordon patent existed in the Meinhard apparatus prior to the time when the invention was made by Gordon, and that that apparatus was practical and successful." 40 Fed. Rep. 155.

Having reached this conclusion the court dismissed the bill, and from that decree the present appeals are prosecuted.

The character of the invention, so far as relates to the first and fourth claims, which are the only claims alleged to be infringed by the appellees, is thus set forth in the specification:

"My invention relates to an improved apparatus having for its object the keeping of beer, ale, or other liquid at a low temperature during the operation of drawing the same for consumption; and it consists in surrounding the supply plate through which the beer is delivered to the faucet with a cold-air passage, for the purpose of maintaining a low temperature in the liquid in the supply pipe."

The first and fourth claims are as follows:

"1. The combination of the ice-box D, supply pipe B, faucet C, and the cold-air passage H, surrounding the supply pipe, substantially as and for the purposes set forth."

"4. The combination of the ice-box D, supply pipe B, faucet C, lower chamber F, and the cold-air passage H, communicating between the ice-box and the chamber, substantially as described."

These two claims are substantially the same, the only difference between them being that the fourth claim includes the

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lower chamber F, which is not specifically mentioned as an element of the combination in the first claim.

The apparatus consists of an upper or saloon ice-box, provided with a suitable faucet and a chamber located in the cellar, which is connected with the upper or saloon ice-box by an air passage, through which passes the beer supply pipe conveying the beer from the keg in the cellar chamber to the faucet in the upper or saloon ice-box. The air cooled by the ice in the upper or saloon ice-box, and the water produced by the melting of the ice, flow down through the air passage, coming in contact with the beer-supply pipe, thereby reducing the temperature of the beer contained therein, and passing through it. The beer is forced from the keg upward through the beer supply pipe to the faucet by air pressure introduced in the keg by any suitable air apparatus.

Gordon made this invention in June, 1879. The anticipating apparatus was used by one Meinhard, in Rochester, New York, in 1877, or early in 1878. That apparatus had the upper ice-box, faucets, the lower chamber, and the supply pipe extending from the upper to the lower chamber, and the supply pipe was surrounded or encased in another pipe which formed an air passage communication between the upper ice-box and the lower chamber. Each supply pipe led to a barrel or keg in the lower chamber, and the upper portion of the supply pipe was surrounded or encased in a tin pipe, while the lower part was enclosed in a rubber hose. The water of the melted ice, and the cold air from the upper ice-box, flowed down around the supply pipe through this tin and rubber encasement. It was claimed that this apparatus was a practical and successful one, and embodied the same principle as that of the Gordon device, though it may have been inferior in degree of utility and perfection, and that the Gordon apparatus was simply an improvement, which did not involve any patentable invention.

It is purely a question of fact, to be determined from the testimony in the cases, whether the anticipating Meinhard apparatus actually existed, as alleged by the appellees. They have established by a number of respectable witnesses that

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such an apparatus was in practical use by Meinhard a year or more prior to the date of the Gordon invention. This testimony is sought to be impeached or contradicted by the appellant, but after a careful examination thereof, we think he fails to break down or discredit the proof by which the anticipating device is established.

The voluminous testimony on this question of fact has been carefully examined, and, without reviewing it in detail, we concur with the court below in thinking that it does establish, clearly and satisfactorily, the existence of the prior Meinhard apparatus, which constituted an anticipation of the Gordon invention.

Again, in a stipulation entered into between the parties, it was agreed as follows:

"It is hereby stipulated by and between the parties hereto that prior to the date of the invention by Mr. Charles Gordon of the improvement described, claimed in letters patent No. ———, or any of the said improvements, there had been in public use in the city of St. Louis, Missouri, and possibly elsewhere, a device or apparatus for drawing and cooling beer, in which were upper and lower ice-boxes, beer-supply pipes, beer kegs, air pipes, air pumps, and faucets, said beer-supply pipes being led from the lower to the upper ice-box in metallic pipes at least four inches in diameter which was filled with sand or gravel; said metallic pipe running from the upper to the lower ice-box; said metallic pipe being closed at its lower end, where it joined the lower ice-box; and below the sand or gravel by a wooden plug or disk, through which the beer-supply pipes pass, this plug or disk forming a bottom for the pipe for the purpose of holding the gravel in the pipe. The said apparatus was in all respects similar to the Gordon device, except the difference hereinbefore stated, it being an apparatus similar to the device shown on page 7 of the 'Cleveland circular,' which is offered in evidence by the defendants, and the same is received and marked 'Defendants' Exhibit Cleveland Circular.'"

This St. Louis apparatus had a beer-supply pipe, connecting the upper ice-box and the barrel or keg in the lower chamber,

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enclosed in a metallic case, four inches in diameter, which was filled with sand or gravel, through which the drippings from the upper ice-box percolated. The metallic case, thus filled, was designed for cooling the beer that remained in the supply pipe by means of the drippings from the upper ice-box, which flowed down through the same, and to some extent it accomplished the desired purpose. The principal was well known at that time, and at the date of the Gordon invention, that cold air from an upper ice-box or chamber would descend through an enclosed connection to a lower chamber. The Gordon invention, by means of an open air chamber surrounding the supply pipe, sought to put this principle to a practical purpose. He dispensed with the sand or gravel, such as filled the metallic case around the supply pipe in the St. Louis apparatus, and left that space open, so that the cold air, as well as the drippings from the upper ice-box, might be conducted through the same. In other words, he simply emptied the metallic case of the St. Louis apparatus of its sand or gravel so as to leave that metallic case open, and allow the cold air from the upper box to flow down through the same. This change in the apparatus does not rise to the dignity of invention such as would entitle him to a patent. The purpose to be accomplished was not patentable, and the particular means devised to secure that purpose did not involve invention. *Carver* v. *Hyde*, 16 Pet. 513, 519; *LeRoy* v. *Tatham*, 14 How. 156; *Corning* v. *Burden*, 15 How. 252; *Barr* v. *Duryee*, 1 Wall. 531; *Fuller* v. *Yentzer*, 94 U. S. 288; *Knapp* v. *Morss*, *ante*, 221.

We are, therefore, of opinion that the Gordon patent is wanting in patentable novelty, and that it was anticipated. The judgment of the court below, in each case, is accordingly

Affirmed.

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In re LENNON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

No. 925. Argued November 17, 1893. — Decided November 27, 1893.

The Toledo and Ann Arbor Railway Company, which connected with the Michigan Southern Railway in the carrying on of interstate commerce, filed a bill in the Circuit Court to restrain the Michigan Southern from refusing to receive its cars used in such commerce, and discriminating against it, on the ground that it employed engineers who were not members of the Brotherhood of Locomotive Engineers. An injunction was issued, and a few days later the Lake Shore applied for an order of attachment against some of its employés who had refused to haul cars and perform service for them, thus hindering them from complying with the order of the court in respect to the Toledo and Ann Arbor Company. A rule to show cause was issued, and such proceedings had thereunder that one of the employés was adjudged guilty of contempt, was fined, and was ordered to be committed until payment of the fine. This employé applied to the Circuit Court for a writ of *habeas corpus*. The petition, after setting the facts forth, claimed that the Circuit Court had no jurisdiction of the cause in which the original order of injunction had been issued, for reasons stated, and further, that it had no jurisdiction of the petitioner's person, because he was no party to that suit, and had not been served with process. The application was denied and the petition dismissed, from which judgment the petitioner appealed to this court. *Held*,

(1) That while the general right of appeal from the judgments of Circuit Courts on *habeas corpus* directly to this court is taken away by the act of March 3, 1891, 26 Stat. 826, c. 517, nevertheless, that right still exists in the cases designated in section 5 of that act;

(2) That the jurisdiction of the Circuit Court over the petition for *habeas corpus* was not in issue, and was not decided adversely to the petitioner, and this appeal therefore did not come within the first of the classes named in section 5 of the act of 1891;

(3) That the construction or application of the Constitution was not involved, in the sense of the statute, and that the petition did not proceed on that theory, but on the ground of want of jurisdiction in the prior case over the subject-matter, and in this case over the person of the petitioner;

(4) That the appeal must be dismissed.

On March 11, 1893, the Toledo, Ann Arbor and North Michigan Railway Company filed its bill of complaint in the

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Circuit Court of the United States for the Northern District of Ohio against the Lake Shore and Michigan Southern Railway Company and other railroad companies, which connected with complainant in the carrying on of interstate commerce, charging that it was the duty of defendants under the act of Congress of February 4, 1888, and the amendments thereto, regulating commerce between the States, to afford equal and reasonable facilities for the interchange of traffic with complainant, and to forward cars and freight in the ordinary transaction of its business without discrimination. The bill further averred that the defendant companies had threatened to refuse to receive from complainant cars offered by it, and to deliver to complainant cars billed over its road for transportation to their destination, and that, because complainant had employed as locomotive engineers men who were not members of the Brotherhood of Locomotive Engineers, those in the employment of defendants had refused to handle cars to be interchanged with complainant's railroad; that the defendant companies offered to other companies free interchange of traffic, but refused to transact business with complainant, thereby discriminating illegally against it; and complainant charged that irreparable damage would result if defendants carried out their threats, and prayed for an injunction.

On March 11 an injunction was granted, restraining, among others, the Lake Shore and Michigan Southern Company, its officers, servants, and employés, from refusing to offer and extend to complainant equal facilities for the interchange of traffic on interstate business, and to receive from that company cars billed from points in one State to points in another State, offered by complainant to defendant companies; and to deliver in like manner to complainant cars billed over complainant's line from points in one State to points in other States. March 18, the Lake Shore and Michigan Southern Company filed its application for an order of attachment against certain engineers and firemen in its service, and among them James Lennon, as being in contempt of the restraining order by refusing to haul cars and perform

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service, and thereby preventing compliance with that order by the company. A rule to show cause was issued, and such proceedings were thereafter had that Lennon was adjudged guilty of contempt, and ordered to pay a fine of fifty dollars and costs, and stand committed until they should be paid, and, upon his refusal, was committed to the custody of the United States marshal for the Northern District of Ohio, whereupon an application for a writ of *habeas corpus* to release him from such custody was made to the Circuit Court for the Northern District of Ohio.

The petition represented that Lennon was unlawfully held in custody and restrained of his liberty in violation of the Constitution and laws of the United States, under the order of the Circuit Court, which order was made in the cause heretofore referred to, and copies of the bill, the restraining order, the application of the railway company for the attachment, the order to show cause, the order in the matter of contempt, and the evidence on the application for the attachment, in that cause, were annexed as exhibits. The petition then proceeded thus:

"Your petitioner further states and alleges, as he is advised, that the said Circuit Court had no jurisdiction or lawful authority to cause the arrest of your petitioner nor to proceed against him in manner as aforesaid, and that the said pretended order and judgment, whereby your petitioner was committed to the custody of the said marshal and whereby he is held in custody of the said marshal and imprisoned and restrained of his liberty, were and are wholly without authority of law and void.

"Said order was issued in a suit whereof the said Circuit Court had no jurisdiction, because the complainant and one of the defendants were at the time of the filing of the said bill of complaint and ever since have been citizens of the same State, to wit, the State of Michigan, and which did not arise under the Constitution or laws of the United States.

"Said Circuit Court had no jurisdiction of the person of your petitioner, because he was not a party to the said suit, nor was he served with any process of subpœna notifying him

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of the same, nor did he have notice of the application made by the complainant for the mandatory injunction, nor was he served by the officers of the court with the said order of injunction, nor did he have any notice whatever of the issuing of the said order of injunction by the Circuit Court, nor of the contents of said order, before the doing of the acts alleged to have been in contempt of said order.

"Said Circuit Court was also without jurisdiction to make the order aforesaid, because it was beyond the jurisdiction of a court of equity to compel the performance of a personal contract for service, and to interfere by mandatory injunction with the contract by which the Lake Shore and Michigan Southern Railway Company hired your petitioner as its servant."

And the petition concluded with the usual prayer for the writ.

Upon hearing, the application was denied and the petition dismissed, from which order an appeal was prayed, allowed, and perfected to this court, and the Circuit Court then made the following certificate:

"The questions certified to the Supreme Court for its decision are the questions of jurisdiction presented by the petition herein filed, to wit:

"1. Is the suit in which the order was made one arising under the Constitution or laws of the United States?

"2. Did the court have jurisdiction of the person of the petitioner by reason of his having had sufficient notice of the proceedings and orders set out in the petition?

"3. Was it beyond the jurisdiction of a court of equity to issue the orders made in said case?"

The opinions of the Circuit Court upon the motion for an injunction and upon the application for the attachment will be found reported in 54 Fed. Rep. 730, 746.

Mr. G. M. Barker and *Mr. Frank H. Hurd* for appellant. *Mr. Walter H. Smith* and *Mr. James H. Southard* were with them on the brief.

Mr. George C. Greene, by leave of court, filed a brief on the part of the Lake Shore and Michigan Southern Railway Company.

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Opinion of the Court.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

We had occasion in *Cross* v. *Burke*, 146 U. S. 82, to examine the various statutes in reference to appeals to this court from judgments of Circuit Courts on *habeas corpus*. The question there was whether this court had jurisdiction to review judgments of the Supreme Court of the District of Columbia on *habeas corpus* by reason of section 846 of the Revised Statutes of the District, which provided that final judgments, orders, or decrees of the Supreme Court of the District might be reëxamined or reversed or affirmed by this court upon writ of error or appeal "in the same cases and in like manner as provided by law in reference to the final judgments, orders, or decrees of the Circuit Courts of the United States;" and we held that such an appeal would not lie in view of the provisions of the act of Congress of March 3, 1885, entitled "An act regulating appeals from the Supreme Court of the District of Columbia and the Supreme Courts of the several Territories." 23 Stat. 443, c. 355. That act did not apply to criminal cases, but was applicable to all judgments or decrees in suits at law or in equity in which there was a pecuniary matter in dispute, and inhibited any appeal or writ of error therefrom, except as therein stated; and as a proceeding in *habeas corpus* is a civil and not a criminal proceeding, and the matter in dispute had no money value which could be calculated and ascertained, the conclusion was that we could not entertain jurisdiction. But inasmuch as the final judgments of the Supreme Court of the District could not be reëxamined here except in the same cases and in like manner as the final judgments of the Circuit Courts of the United States, we added that "it may also be noted that under the Judiciary Act of March 3, 1891, 26 Stat. 826, 828, c. 517, § 5, appeals from decrees of Circuit Courts on *habeas corpus* can no longer be taken directly to this court in cases like that at bar, but only in the classes mentioned in the fifth section of that act." This observation indicated another ground upon which the case might have been disposed of, and was not made without consideration.

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By the fourth section of the Judiciary Act of March 3, 1891, it was provided that "the review, by appeal, by writ of error, or otherwise, from the existing Circuit Courts shall be had only in the Supreme Court of the United States or in the Circuit Courts of Appeals hereby established, according to the provisions of this act regulating the same." Section five defined the cases in which appeals or writs of error might be taken from the Circuit Courts directly to this court; and by the sixth section the Circuit Courts of Appeals were vested with appellate jurisdiction to review final decisions in the Circuit Courts "in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law." Section fourteen expressly repealed all acts and parts of acts relating to appeals or writs of error inconsistent with sections five and six, and we remarked in *Lau Ow Bew* v. *United States*, 144 U. S. 47, 56, that the words "unless otherwise provided by law" were manifestly inserted in the sixth section "out of abundant caution, in order that any qualification of the jurisdiction by contemporaneous or subsequent acts should not be construed as taking it away except when expressly so provided. Implied repeals were thereby intended to be guarded against. To hold that the words referred to prior laws would defeat the purpose of the act, and be inconsistent with its context and its repealing clause."

By section 763 of the Revised Statutes it was provided that an appeal to the Circuit Court might be taken from decisions on *habeas corpus* in the case of any person alleged to be restrained of his liberty in violation of the Constitution or of any law or treaty of the United States, and in the case of the subjects or citizens of foreign States, committed, confined, or in custody as therein set forth; and by section 764, as amended by act of Congress of March 3, 1885, 23 Stat. 437, c. 353, an appeal to this court from the Circuit Court was provided for. Section 765 referred to the terms, regulations, and orders on and under which appeals should be taken, and section 766 prescribed that, pending the proceedings or appeal "in the cases mentioned in the three preceding sections," and until final judgment therein, and after final judgment of dis-

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charge, there could be no valid state proceedings in interference with the same matter. By act of Congress of March 3, 1893, 27 Stat. 751, c. 226, section 766 was amended by adding thereto the following words: "*Provided*, That no such appeal shall be had or allowed after six months from the date of the judgment or order complained of." And it is argued that if sections 763, 764, and 765 had been repealed by the Judiciary Act of March 3, 1891, this amendment would have been meaningless, and that if it had been intended that under that act appeals in *habeas corpus* were to be taken from the Circuit Court to the Circuit Court of Appeals, the limitation of six months prescribed by the amendment would have been unnecessary because that limitation was already provided for in section 12 of the act; and that, therefore, it must be concluded from the amendment that Congress regarded the sections specially providing for appeals on *habeas corpus* as unrepealed by the act of March 3, 1891. We do not concur in this view. While the right of appeal from the judgments of Circuit Courts on *habeas corpus* directly to this court, in all cases, is taken away by the act of March 3, 1891, that right still exists in the cases designated in section 5 of that act, and upon such appeals the amendment may operate.

In *Nishimura Ekiu* v. *United States*, 142 U. S. 651, jurisdiction of an appeal on *habeas corpus* directly from the Circuit Court was taken, as it was in *Horner* v. *United States*, (No. 2,) 143 U. S. 570, upon the ground that the constitutionality of a law of the United States was drawn in question; and this would be so in any case that involves, within the intent and meaning of the statute, the construction or application of the Constitution of the United States, or where the constitution or law of a State was claimed to be in contravention of the Constitution, and the disposition of the case turned upon such constitution or law. These would be cases within the classes enumerated in section 5, but the only one of those classes within which it seems to have been contended, when this appeal was taken, that this case fell, is the first class, which is composed of those cases "in which the jurisdiction of the court is in issue; in such case the question of jurisdic-

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tion alone shall be certified from the court below to the Supreme Court for decision." And, allowing the appeal to this court on that ground, the Circuit Court certified certain questions to this court "as questions of jurisdiction presented by the petition herein filed." But these questions relate not to the question of the jurisdiction of the Circuit Court in this matter of *habeas corpus*, but to the jurisdiction of that court in the case of the Toledo, Ann Arbor and North Michigan Railroad Company against the Lake Shore and Michigan Southern Railway Company and others, in which the writ of injunction was issued, and the order fining Lennon for contempt was made.

This is not an application to us to issue the writ of *habeas corpus* in the exercise of appellate jurisdiction, accompanied by a writ of *certiorari* to bring up the record and proceedings of the court below, though even then, the writ is not to be used to perform the office of a writ of error or appeal. *In re Tyler, Petitioner*, 149 U. S. 164. It is a direct appeal from the judgment of the Circuit Court on *habeas corpus*, in reaching which that court considered the questions certified; but the jurisdiction of the Circuit Court over the petition for *habeas corpus* was not in issue, and a decision in respect thereof was not rendered against appellant, but, on the contrary, jurisdiction was entertained.

Granted, as contended, that the jurisdiction to discharge the prisoner in this case depended upon a want of jurisdiction to commit him in the other, yet the jurisdiction invoked by the petitioner was the jurisdiction to remand as well as to discharge, or, in other words, the power to hear and to determine whether he was lawfully held in custody or not.

This appeal, therefore, as ruled in *Carey* v. *Texas and Houston Central Railway*, *ante*, 170, and for the reasons therein given, does not come within the first of the classes specified in the fifth section.

Nor can the attempt be successfully made to bring the case within the class of cases in which the construction or application of the Constitution is involved in the sense of the statute, on the contention that the petitioner was deprived of his liberty

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Syllabus.

without due process of law. The petition does not proceed on any such theory, but entirely on the ground of want of jurisdiction in the prior case over the subject-matter and over the person of petitioner, in respect of inquiry into which the jurisdiction of the Circuit Court was sought. If, in the opinion of that court, the restraining order had been absolutely void, or the petitioner were not bound by it, he would have been discharged, not because he would otherwise be deprived of due process, but because of the invalidity of the proceedings for want of jurisdiction. The opinion of the Circuit Court was that jurisdiction in the prior suit and proceedings existed, and the discharge was refused, but an appeal from that judgment directly to this court would not, therefore, lie on the ground that the application of the Constitution was involved as a consequence of an alleged erroneous determination of the questions actually put in issue by the petitioner.

Appeal dismissed.

ROOT v. WOOLWORTH.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

No. 77. Argued and submitted November 10, 1893. — Decided November 27, 1893.

In 1870, M., a citizen of Indiana, filed a bill in equity in the Circuit Court of the United States for the District of Nebraska against R., a citizen of Nebraska, to establish his right to real estate near Omaha, to which R. set up title. Each claimed under a judicial sale against P. M. obtained a decree in 1872, establishing his title, and directing R. to convey to him, or, in default of that, authorizing the appointment of a master to make the conveyance. R. refused to make the conveyance, and it was made by a master to M. under the decree. The entire interest of M. came by mesne conveyances to W., a citizen of Nebraska. M. reëntered upon the premises, and set up the title which had been declared invalid in the decree of 1872. W. thereupon filed in the same court an ancillary bill, praying that R. be restrained from asserting his pretended title and from occupying the premises; that he might be decreed to have no interest in the lands; that a writ of possession issue, commanding the marshal summarily to remove R., his tenants and agents from the premises, and

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Statement of the Case.

that R. be perpetually enjoined from setting up his claims. R. demurred on the ground of want of jurisdiction by reason of both parties being citizens of the same State. The demurrer was overruled, the defendant answered, and upon the pleadings and proofs a decree was entered for plaintiff, in conformity with the prayer in the bill. *Held*,

(1) That the bill was clearly a supplemental and ancillary bill, such as the court had jurisdiction to entertain, irrespective of the citizenship of the parties;

(2) That the original decree not only undertook to remove the cloud on M's title, but it included and carried with it the right to possession of the premises, and that right passed to W. as privy in estate;

(3) That certain facts set up as to an alleged transfer by M. of his interest to a citizen of Nebraska before filing his bill could not be availed of collaterally after such a lapse of time, and with no excuse for the delay;

(4) That the property claimed could be fully identified;

(5) That until R. should give notice that his holding was adverse to W., the latter was entitled to treat it as a holding in subordination to the title of the real owner under the decree of 1872.

THE appellee, as a privy in interest and estate, filed the bill in this case for the purpose of carrying into execution a former decree of the court, rendered in 1873, against the appellant in favor of Oliver P. Morton, by which the latter's right and title to a certain parcel of land was settled and established, and to which title and interest the appellee thereafter succeeded.

The proceedings in which the original decree was rendered were begun in 1870 in the Circuit Court of the United States for the District of Nebraska by Oliver P. Morton, in a suit against Allen Root, the appellant, to establish his right to certain premises near the city of Omaha, and to have the claim which Root asserted thereto declared a cloud upon his title. Both parties claimed the land under judicial sales previously had against one Roswell G. Pierce. The decree established the superiority of Morton's title, and ordered that Root should execute a conveyance of the premises to him within a designated time, and upon his failure so to do a special master, appointed for that purpose, was invested with the authority and directed to make such conveyance. Root did not appeal from this decree, which remains in full

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force and unannulled or reversed, but he refused to make the conveyance, and the special master thereupon, by deed, transferred the property to Morton.

Thereafter, in June, 1873, Morton conveyed an undivided half interest in the premises to James Woolworth, the appellee, and the other half interest to his brother, William S. T. Morton. Upon the death of the latter his executors, under power and authority conferred by his will, transferred to Woolworth the other half interest in the premises. Being thus invested with the entire title, and Root having reëntered or resumed possession of the premises, Woolworth filed the present bill against him, in the same court, to carry into effectual execution the decree which had been rendered against Root in Morton's favor.

In his bill, after reciting the proceedings under which Morton originally acquired title to the premises, the suit under which that title was established as against Root, and the conveyance to Morton under the decree of the court, Woolworth set forth his acquisition of the title, and alleged that he had laid the property out into streets, blocks, and lots, and made it an addition to the city of Omaha; that he had sold several of those lots, and that he had paid the taxes on all of the property since 1873; that he had remained in undisturbed possession from 1873 up to within a short time before the filing of the bill, at which time Root had assumed to take possession of the premises, or a portion thereof, by building a fence around the same and a house thereon, and in exercising other acts of alleged ownership over the property.

The bill further alleged that in reëntering upon the premises Root claimed no rights therein or title thereto, except such as were asserted by him in opposition to Morton's right and title in the original suit; that his object in retaking possession was to induce parties to accept leases under him, and thereby drive the complainant to a multiplicity of actions to recover possession and reëstablish his rights to the premises, and it was averred that, "in order to carry the decree of this court made on the 8th of May, 1873, into

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execution and give to your orator the full benefit thereof it is necessary that it shall be supplemented by an order of injunction hereinafter prayed, and unless such injunction be allowed to your orator such decree will be ineffective and your orator will be subjected to a multiplicity of suits in order to recover possession of the said premises from the parties to whom said defendant will lease the same. If left to himself, not only will the said defendant subject your orator to numerous actions for the recovery of the possession of said premises from many parties whom the said defendant will induce to enter upon the same, but, as your orator is informed and believes, the said defendant threatens to, and unless restrained by the order and injunction of your honors will, institute divers actions in respect of the title of the said premises and thereby vex, annoy, and harass your orator."

The bill further alleged that in the sheriff's deed to Morton, under the original judicial proceedings against Pierce, the premises were described as follows: "All that piece of land beginning at the northwest corner of section twenty-eight, thence south eight chains and five links; thence south eighty-five degrees twenty chains and two links; thence north nine chains and twenty links; thence west twenty chains to the place of beginning, all being in township fifteen, range thirteen east of the sixth principal meridian, in said county of Douglas," which presented an apparent obscurity or defect in the fact that the word *east* was omitted in the second call after the words "eighty-five," and that the defendant claimed that this defect was so radical as to afford no identification of the premises, and rendered the decree void; but the complainant averred that the sufficiency of that description was considered in the suit of Morton against Root, and that it was there held that the omission was no substantial defect, such as prevented the title from passing and vesting in Morton.

The prayer of the bill was that the defendant be, by order and injunction of the court, enjoined and restrained from asserting any right, title, or interest in the said premises, and from occupying the same or any part thereof, or leasing or pretending to lease, or admitting under any pretence what-

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ever, any party, save the complainant, into the said premises, or upon the same, and from making any verbal or written contract, deed, lease, or conveyance, affecting the said premises, or the possession thereof, or the title thereto, and from excluding the complainant from said premises, or any part thereof, or preventing him from taking sole and exclusive possession of the same; and that by decree it might be declared that the said defendant has not, and never had, any interest whatever in the said lands, as had been already declared and adjudged in the former decree; and that a writ of possession issue out of the court directed to the marshal, commanding him summarily to remove the defendant, his tenants, and agents therefrom; and that the injunction as prayed for might be made perpetual.

To this bill the defendant Root demurred for the reason that the court had no jurisdiction, because both complainant and defendant were citizens of the same State; because the bill was a proceeding in a court of equity in the nature of an ejectment bill, and because the complainant had a speedy and adequate remedy at law. The demurrer was overruled, the court basing its action upon the ground that the bill was ancillary or supplemental to the original cause of *Morton* v. *Root*, and was, therefore, not open to the objections taken against it.

Root then answered the bill, setting up the same defences interposed by him in the case of *Morton* v. *Root*, and further alleged that the decree in that case was void because Morton and his attorney had practised a fraud upon the court in concealing the fact that in 1869, prior to the institution of that suit, Oliver P. Morton had transferred and conveyed the premises in question to his brother, William S. T. Morton, which conveyance had been duly recorded in Douglas County, Nebraska, so that Oliver P. Morton had no title when he instituted his original suit, nor when the decree was rendered against defendant.

The answer further set up that the premises were so defectively described in the sheriff's deed to Morton, under the latter's attachment proceedings against Pierce, as to render

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the same ineffectual and inoperative to vest title to the premises in controversy. The defendant also claimed that he had been in open and adverse possession of the premises since May 1, 1869, and that the complainant's rights were, therefore, barred by the statute of limitations. He further alleged that the decree in the suit of Morton against Root was one simply to remove a cloud upon the title and not to establish or confer any right of possession.

Upon pleadings and proofs, the Circuit Court rendered a decree in appellee's favor, in conformity with the prayer of his bill. 40 Fed. Rep. 723. From that decree the present appeal was prosecuted.

Mr. Upton M. Young and *Mr. George W. Covell*, for appellant, submitted on their brief, in which they contended:

I. There is a defect in the jurisdiction of the Circuit Court, which is apparent on the face of the bill. Equity will not entertain a bill solely for purposes that could be accomplished by an action in ejectment. *Hipp* v. *Babin*, 19 How. 271; *Lewis* v. *Cocks*, 23 Wall. 466; *Ellis* v. *Davis*, 109 U. S. 485; *Killian* v. *Ebbinghaus*, 110 U. S. 568; *United States* v. *Wilson*, 118 U. S. 86; *Speigle* v. *Meredith*, 4 Bissell, 120.

II. The Circuit Court of the United States has no jurisdiction of a suit between parties who are citizens of the same State. *Van Antwerp* v. *Hulburd*, 8 Blatchford, 285; *Livingston* v. *Van Ingen*, 1 Paine, 45; *Merserole* v. *Union Paper Collar Co.*, 6 Blatchford, 356.

III. That the bill cannot be sustained against the defendant as a bill of peace, is fully established by the following points and authorities. In regard to bills of peace between single adverse claimants, it may now be regarded as settled that, unless the title has been established at law, except where the rule has been changed by statute, the court will not interfere. 3 Pomeroy's Eq. Jur. § 1394. Possession as well as an established legal title is necessary to the maintenance of a bill of peace of this class. 3 Pomeroy's Eq. Jur. §§ 1394, 1396; *Orton* v. *Smith*, 18 How. 263.

That this action cannot be maintained as a suit to quiet

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the plaintiff's title, and to declare that the defendant has not and never had any interest whatever in the lands described in complainant's bill, is evident from the well-known rule that jurisdiction is only exercised by courts of equity when the estate or interest to be protected is equitable in its nature, or when the remedies at law are inadequate where the estate or interest is legal.

Whether or not the jurisdiction will be exercised depends upon the fact that the estate or interest to be protected is equitable in its nature, or that the remedies at law are inadequate, where the estate or interest is legal — a party being left to his legal remedy where his estate or interest is legal in its nature, and full and complete justice can thereby be done. *De Witt* v. *Hays*, 2 California, 463; *S. C.* 56 Am. Dec. 352; *Hinchley* v. *Greaney*, 118 Mass. 595.

The remedy by injunction to yield up or quit possession of land, and the writ of possession to summarily remove a defendant from land, are writs which are only granted by, and issued out of courts of equity, in aid of a decree in chancery, where there has been a foreclosure of equity of redemption, and a sale of mortgaged premises been decreed, and the defendant or any person who has come into possession under him, pending the suit, refuses to deliver up the possession, on demand, to the purchaser under the decree.

The principle may be stated in its broadest generality, that in cases where the primary right, interest, or estate, to be maintained, protected, or redressed, is a legal one, and a court of law can do as complete justice to the matter in controversy both with respect to the relief granted and to the modes of procedure by which such relief is conferred, as could be done by a court of equity, equity will not interfere even with those peculiar remedies which are administered by it alone, such as injunction, cancellation, and the like, much less with those remedies which are administered both by it and the law, and which, therefore, belong to the concurrent jurisdiction. *Southampton Dock Co.* v. *Southampton &c. Harbor Board*, L. R. 11 Eq. 254. And the same doctrine applies under the reformed system of procedure. *Kyle* v. *Frost*, 29

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Indiana, 382. See also, sustaining the general principle as stated above, *Grand Chute* v. *Winegar*, 15 Wall. 373; *Insurance Co.* v. *Bailey*, 13 Wall. 616; *Hipp* v. *Babin*, 19 How. 271.

IV. The court is without jurisdiction to hear and determine the merits of this case, because both parties are citizens of the State of Nebraska, as alleged in the bill; — because complainant shows by his bill that his remedy is at law, by ejectment instead of in equity; — because complainant has not made such a case by his bill as would authorize the court to hear and determine the same, as a court of equity, even though complainant and defendant were citizens of different States.

V. We contend that, as no steps were ever taken by Morton, under judicial proceedings, or otherwise, to disturb the actual possession of Allen Root, the statute of limitations was neither suspended nor interrupted.

The Supreme Court of Missouri, in case of *Mabary* v. *Dollarhide*, 98 Missouri, 198, held that a judgment in ejectment, not followed by any writ, nor by taking possession under it, does not suspend the statute of limitations.

The Supreme Court of Kentucky, in the case of *Smith* v. *Hornback*, 4 Littell, 232, held that a judgment in ejectment, never executed, and under which possession has never been demanded, does not stop the running of the statute of limitations. The case of *Morton* v. *Root* was a void proceeding resulting in May, 1873, in a void decree to remove a cloud from Morton's supposed title, with which he had parted before his bill was filed, and a title which he did not have when the final decree was rendered. There was nothing in the decree that contemplated disturbing the continuity of Root's possession. In *Smith* v. *Trabue*, 1 McLean, 87, it was held that a judgment in an action of ejectment against a defendant, who holds adversely, does not of itself suspend the statute of limitations. To do this there must be a change of possession. The following cases support the same view: *Dol* v. *Reynolds*, 27 Alabama, 354; *Jackson* v. *Haviland*, 13 Johns. 229.

The decree quieting the title in Morton would not break the continuity of Root's possession, nor stop the running of the statute of limitations.

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Opinion of the Court.

VI. Waiving, then, all other questions, we regard the adverse possession of this defendant, and those under whom he claims, as conclusive upon the rights of the plaintiff. In the case of *Ellis* v. *Murray*, 28 Mississippi, 129, under the third section of the act of limitations, passed in 1844, it was held that "actual adverse possession for ten years vests a full and complete title to the land in possession; and a party having had such possession might sue for the recovery of it at any time within the period limited in the first section, without further evidence of his title than that he had had ten years in actual adverse possession; that it was intended to secure a right of property by the possession of ten years." See also *Beaupland* v. *McKeen*, 28 Penn. St. 124; *S. C.* 70 Am. Dec. 115; *Hoey* v. *Furman*, 1 Penn. St. 295; *S. C.* 44 Am. Dec. 134; *Webbs* v. *Hynes*, 9 B. Mon. 388; *S. C.* 50 Am. Dec. 515; *Clement* v. *Perry*, 34 Iowa, 564; *Clark* v. *Potter*, 32 Ohio St. 49; *Noyes* v. *Dyer*, 25 Maine, 468; *Spear* v. *Ralph*, 14 Vermont, 400.

VII. Oliver P. Morton by his deed on the 19th day of August, 1869, conveyed the property in controversy to William S. T. Morton. Said deed was a valid one under the laws of Indiana, where no witnesses were required, and being valid where made was valid under the laws of Nebraska. *Green* v. *Gross*, 12 Nebraska, 117, 123.

Oliver P. Morton had no title at any time during the pendency of his suit against Allen Root; the court, therefore, was without jurisdiction to render its decree of May 8, 1873. The decree in that case having been obtained on the representation that Morton was the owner of the property, was a fraud upon the court, and the decree being fraudulent can be defended against by Root in this suit. See *Marshall* v. *McGee*, 33 Hun, 354.

Mr. Burton N. Harrison, (with whom was *Mr. James L. Woolworth* on the brief,) for appellee.

Mr. Justice Jackson, after stating the case, delivered the opinion of the court.

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It is not necessary to notice or consider separately the numerous assignments of error presented by the appellant. They may be reduced to the following propositions: (1) That the court had no jurisdiction to entertain the bill, because it is in the nature of an ejectment bill, and that there is a full and adequate remedy at law; (2) that there was fraud on the part of Morton and his attorney in obtaining the former decree of 1873 by concealing the fact that Morton, before the beginning of his suit against defendant, had transferred the premises to his brother, William S. T. Morton; (3) that there was such defective description of the premises, in the Morton suit and the original decree, as rendered that decree inoperative to vest the title of the land in controversy; and (4) the defendant's adverse possession of the property.

In support of the assignments of error covered by the first proposition, it is urged on behalf of appellant that the suit should be treated and regarded as an ejectment bill to recover the possession of real estate, such as a court of equity cannot entertain in favor of a party holding a legal title like that which the complainant asserts. It is undoubtedly true that a court of equity will not ordinarily entertain a bill solely for the purpose of establishing the title of a party to real estate, or for the recovery of possession thereof, as these objects can generally be accomplished by an action of ejectment at law. *Hipp* v. *Babin*, 19 How. 271; *Lewis* v. *Cocks*, 23 Wall. 466; *Ellis* v. *Davis*, 109 U. S. 485; *Killian* v. *Ebbinghaus*, 110 U. S. 568; *Fussell* v. *Gregg*, 113 U. S. 550, 554.

If the bill in the present case could be properly considered as an ejectment bill, the objection taken thereto by the defendant would be fatal to the proceeding; but instead of being a bill of this character it is clearly a supplemental and ancillary bill, such as the court had jurisdiction to entertain. *Shields* v. *Thomas*, 18 How. 253, 262; *Thompson* v. *Maxwell*, 95 U. S. 391, 399; Story's Eq. Plead. §§ 335, 338, 339, 429.

It is well settled that a court of equity has jurisdiction to carry into effect its own orders, decrees, and judgments, which remain unreversed, when the subject-matter and the parties

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are the same in both proceedings. The general rule upon the subject is thus stated in Story's Equity Pleading, (9th ed.,) § 338:

"A supplemental bill may also be filed, as well after as before a decree; and the bill, if after a decree, may be either in aid of the decree, that it may be carried fully into execution; or that proper directions may be given upon some matter omitted in the original bill, or not put in issue by it, or by the defence made to it; or to bring forward parties before the court, or it may be used to impeach the decree, which is the peculiar case of a supplemental bill, in the nature of a bill of review, of which we shall treat hereafter. But where a supplemental bill is brought in aid of a decree, it is merely to carry out and to give fuller effect to that decree, and not to obtain relief of a different kind on a different principle; the latter being the province of a supplementary bill in the nature of a bill of review, which cannot be filed without the leave of the court."

Under this principle Morton could undoubtedly have brought the bill to carry into effect the decree rendered in his favor against Root, and it is equally clear that his assignee, or privy in estate, has a right to the same relief that Morton could have asserted. On this subject it is stated in Story's Equity Pleading, § 429: "Sometimes such a bill is exhibited by a person who was not a party, or who does not claim under any party to the original decree; but who claims in a similar interest, or who is unable to entertain the determination of his own rights, till the decree is carried into execution. *Or it may be brought by or against any person claiming as assignee of a party to the decree.*" The appellee in the present case occupies that position, and he should not, any more than Morton, to whose rights he has succeeded, be put to the necessity of instituting an original or independent suit against Root, and relitigate the same questions which were involved in the former proceeding.

The jurisdiction of courts of equity to interfere and effectuate their own decrees by injunctions or writs of assistance in order to avoid the relitigation of questions once settled be-

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tween the same parties, is well settled. Story's Eq. Jur. § 959; *Kershaw* v. *Thompson*, 4 Johns. Ch. 609, 612; *Schenck* v. *Conover*, 13 N. J. Eq. (2 Beasley) 220; *Buffum's case*, 13 N. H. 14; *Shepherd* v. *Towgood*, Tur. & Rus. 379; *Davis* v. *Bluck*, 6 Beav. 393. In *Kershaw* v. *Thompson*, the authorities are fully reviewed by Chancellor Kent, and need not be reëxamined here.

It is said, however, on behalf of the appellant, that the original decree only undertook to remove the cloud upon the title, and did not deal with the subject of possession of the premises, and that the present bill, in seeking to have possession delivered up, proposes to deal with what was not concluded by the former decree. This is manifestly a misconception of the force of the original decree, which established and concluded Morton's title as against any claim of the appellant, and thereby necessarily included and carried with it the right of possession to the premises as effectually as if the defendant had himself conveyed the same. The decree in its legal effect and operation entitled Morton to the possession of the property, and that right passed to the appellee as privy in estate.

In *Montgomery* v. *Tutt*, 11 California, 190, there was a decree of sale, which did not require or provide for the delivery of possession of the premises to the purchaser. Subsequently the defendant refused to surrender possession, and a writ of assistance was sought by the purchaser to place him in possession of the premises under the master's deed. Field, J., delivering the opinion of the court, said:

"The power of the court to issue the judicial writ, or to make the order and enforce the same by a writ of assistance, rests upon the obvious principle that the power of the court to afford a remedy must be coextensive with its jurisdiction over the subject-matter. Where the court possesses jurisdiction to make a decree, it possesses the power to enforce its execution. It is true that in the present case the decree does not contain a direction that the possession of the premises be delivered to the purchaser. It is usual to insert a clause to that effect, but it is not essential. It is necessarily implied in the direc-

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tion for the sale and execution of a deed. The title held by the mortgagor passes under the decree to the purchaser upon the consummation of the sale by the master's or sheriff's deed. As against all the parties to the suit, the title is gone; and, as the right to the possession, as against them, follows the title, it would be a useless and vexatious course to require the purchaser to obtain such possession by another suit. Such is not the course of procedure adopted by a court of equity. When that court adjudges a title to either real or personal property, to be in one as against another, it enforces its judgment by giving the enjoyment of the right to the party in whose favor it has been decided."

The principle thus laid down is directly applicable to the present case.

The bill being ancillary to the original proceeding of Morton against Root, and supplementary to the decree rendered therein, can be maintained without reference to the citizenship or residence of the parties. There is consequently no force in the objection that the court below had no jurisdiction in this case because the appellee and the appellant were both citizens of Nebraska. *Krippendorf* v. *Hyde*, 110 U. S. 276; *Pacific Railroad* v. *Missouri Pacific Railway*, 111 U. S. 505.

It is next contended on the part of the appellant that the decree sought to be carried into execution is void because there was fraud on the part of Morton in concealing from the court the fact that he had transferred the premises in August, 1869, to his brother, William S. T. Morton. That conveyance, as set up in the answer, was duly recorded in the register's office of Douglas County prior to the filing of Morton's bill against the appellant. It is not shown in the answer why the appellant did not avail himself in the former trial of this transfer of which he had constructive notice. Nor does it appear from any averments in the answer, or from the proofs, that his rights were in any way prejudiced or affected thereby. He was not prevented by that transfer from exhibiting fully his own case, or setting up his superior title to the premises, which was the subject-matter of the contest between Morton and himself.

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The appellant could not by a direct proceeding have impeached the former decree for this alleged fraud, because, even if it were sufficient to invalidate that decree, he shows no reason why it was not interposed or set up in the former suit. The facts set up in the answer relating to the conveyance of 1869 from Morton to his brother do not, of themselves, constitute such a fraud as would be sufficient to vacate the decree in a direct proceeding to impeach it, and certainly it cannot be collaterally attacked in an answer, as the appellant has sought to do, after such a lapse of time, and with no valid excuse given for the delay. *Hammond* v. *Hopkins*, 143 U. S. 224.

But aside from this objection to this defence, it is clearly established by the proof in the cause that, before Morton instituted his suit against Root, a writing was executed between himself and his brother, William S. T. Morton, which operated to vacate the conveyance of August, 1869, and to revest the title to the property in Oliver P. Morton, so that there was actually no lack of title to the premises in Oliver P. Morton at the date of the institution of his suit against Root. The objection interposed by the defendant, therefore, is clearly wanting in any force or merit.

In respect to the next position assumed by the defendant, that the description of the property was so defective as not to vest Morton with any title to the premises in controversy, it is sufficient to say that the same point was set up in the former suit, but was overruled, because the testimony given by surveyors clearly established that the omission of the word *east* from the second call of the description in no way affected the identification of the property, and that by reversing the calls the word *east* would be necessarily included in the description. The same testimony, in substance, was introduced in this case, and established that the description in the sheriff's deed to Morton fully identified the land in question.

As to the remaining contention, that the appellant had been in adverse possession of the premises since 1869, it appears from the proof in the cause that he did not reënter or take

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possession thereof until 1888. The statute of limitations, therefore, does not constitute any bar to the complainant's right to maintain the bill. But aside from this, the appellant stands in the same position now that he did in the former suit, when it was decreed that he had no right, title, or interest in the property. If, since that decree, he has enclosed a part of the land, cut wood from it, or cultivated it, he would be treated and considered as holding it in subordination to the title of Morton and his privy in estate, until he gave notice that his holding was adverse, and in the assertion of actual ownership in himself. In his position he could not have asserted adverse possession after the decree against him, without bringing express notice to Morton or his vendees that he was claiming adversely. Without such notice the length of time intervening between the decree and the institution of the present suit would give him no better right than he previously possessed, and his holding possession would, under the authorities, be treated as in subordination to the title of the real owner. This is a well established rule. *Jackson* v. *Bowen*, 1 Wend. 341; *Burhans* v. *Van Zandt*, 7 Barb. 91; *Ronan* v. *Meyer*, 84 Indiana, 390; *Jeffery* v. *Hursh*, 45 Michigan, 59; *Jackson* v. *Sternbergh*, 1 Johns. Cas. 153; *Doyle* v. *Mellen*, 15 R. I. 523; *Zeller's Lessee* v. *Eckert*, 4 How. 289.

We are of opinion that the decree below was clearly correct, and should be *Affirmed.*

JACOBS *v.* GEORGE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 87. Submitted November 20, 1893.—Decided November 27, 1893.

When an appeal is allowed in open court, and perfected during the term at which the decree or judgment appealed from was rendered, no citation is necessary.

When an appeal is allowed at the term of the decree or judgment, but is not perfected until after the term, a citation is necessary to bring in the parties; but if the appeal be docketed here at the next ensuing term, or

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the record reaches the clerk's hands seasonably for that term, and legal excuse exists for lack of docketing, a citation may be issued, by leave of this court, although the time for taking the appeal has elapsed.

When an appeal is allowed at a term subsequent to that of the decree or judgment appealed from, a citation is necessary; but it may be issued, properly returnable even after the expiration of the time for taking the appeal, if the allowance of the appeal were made before.

A citation is one of the necessary elements of an appeal taken after the term, and if it be not issued and served before the end of the next ensuing term of this court, and be not waived, the appeal becomes inoperative.

THE case is stated in the opinion.

Mr. W. H. Barnes for appellant.

No appearance for appellee.

THE CHIEF JUSTICE: Judgment in this case was rendered by the Supreme Court of the Territory of Arizona, January 19, 1889, that the judgment of the court below under review by that court be reversed and the complaint dismissed with costs.

January 13, 1890, being one of the days of the next regular term of the court, an appeal was prayed to this court, the appeal was allowed January 14, 1890, conditioned on giving bond, and certain findings of the Supreme Court were filed that day. January 24, 1890, the required bond was approved and filed, and the record was filed here, March 14, 1890, at October term, 1889. No citation was issued and served, nor has any appearance for appellee been entered, nor is any waiver of citation shown.

It must be regarded as settled that: (1) Where an appeal is allowed in open court, and perfected during the term at which the decree or judgment appealed from was rendered, no citation is necessary; (2) Where the appeal is allowed at the term of the decree or judgment, but not perfected until after the term, a citation is necessary to bring in the parties; but if the appeal be docketed here at our next ensuing term, or the record reaches the clerk's hands seasonably for that term, and legal excuse exists for lack of docketing, a citation may be issued by leave of this court, although the time for taking the

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appeal has elapsed; (3) Where the appeal is allowed at a term subsequent to that of the decree or judgment, a citation is necessary, but may be issued properly returnable, even after the expiration of the time for taking the appeal, if the allowance of the appeal were before; (4) But a citation is one of the necessary elements of an appeal taken after the term, and if it is not issued and served before the end of the next ensuing term of this court, and not waived, the appeal becomes inoperative. *Hewitt* v. *Filbert*, 116 U. S. 142; *Richardson* v. *Green*, 130 U. S. 104; *Evans* v. *State Bank*, 134 U. S. 330; *Green* v. *Elbert*, 137 U. S. 615. *Appeal dismissed.*

SALTONSTALL v. BIRTWELL.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 116. Argued November 24, 1893. — Decided December 4, 1893.

Findings of fact in an action brought to recover duties on importations paid under protest, which do not show what the collector charged the plaintiff, nor sufficiently describe the articles imported, and a record which fails to show under what provisions of the tariff act the parties claimed respectively, leave this court unable to direct judgment for either party.

In such case the opinion of the court below cannot be resorted to to help the findings out.

THIS was an action to recover duties paid under protest on importations made in 1888. The first count of the plaintiff's declaration was on an account annexed as follows:

"BOSTON, *July* 3, 1888.

"Leverett Saltonstall, collector, etc., to Joseph Birtwell, Dr.

"Feb. 29, 1888. To excess of duty paid on 432 pieces of manufactures of iron entered ex-steamship Jan Breydel, Feb. 27, 1888..... $1800

"Mch. 14, 1888. To excess of duty paid on 4 pieces of manufactures of iron entered ex-steamship Petre de Connick, Mch. 14, 1888..... 75"

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The case was tried by the court under a stipulation waiving a jury, as provided by sections 649 and 700 of the Revised Statutes. No exceptions to rulings in the progress of the trial were saved, and the court made the following findings:

"1st. That as a matter of law the descriptions of iron in the clause under which the defendant acted in this case refer to and are intended to provide for such described forms and shapes of iron in that condition of manufacture when they are complete and merchantable, salable, and dealt in as such described forms and shapes of iron, and do not refer to or provide for such forms and shapes of iron when they have been advanced by manufacture beyond such merchantable salable condition to and for a specific purpose and use as a new product or component parts of a new product.

"2d. It is found as a fact that the imports in this case were not within the descriptions of iron provided for in the clause under which the defendant acted as understood, considered, and treated in trade among dealers, users, and manufacturers in 1883 and since that time.

"3d. It is found as a fact that the described forms and shapes of iron provided for in the clause under which the defendant acted are, as understood in trade among dealers, users, and manufacturers complete as such described forms and shapes of iron when they are completed by rolling and squaring ends, and it is further found as a fact that the imports in this case had been since completed by rolling and squaring ends, advanced by manufacture, fitting, shaping, etc., and made complete, ready, and intended for use as component parts of the frame or foundation of the floor in the third story of the court-house now being erected in Boston.

"4th. It is further found as a fact that in commercial designation, habit, and dealing among merchants, users, and manufacturers, the descriptive words applied to iron in the clause used by the defendant did in 1883 mean or refer to such described forms and shapes of iron as are rolled with ends squared, and did exclude such described forms and shapes of iron when manufactured beyond such rolled condition to and for a special particular use and purpose.

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"5th. It is further found as a fact that the imports in this case could not be bought and sold in the open general market at regular prices as and for any of the descriptions of iron named in the clause under which the defendant acted.

"6th. It is further found as a fact that the plaintiff duly protested to the defendant collector against the exaction of the duty paid, and appealed to the Secretary of the Treasury, who affirmed the action of the defendant, whereupon the plaintiff in due time brought this suit."

Judgment was thereupon rendered for the recovery of the sum of $1853.75 damages, and costs. This writ of error was then sued out and the following errors assigned: "That said judgment is erroneous in that the facts are not sufficient to authorize the same in law; and that said judgment is erroneous, from the facts found, in not being a judgment in favor of the defendant." The record contains the opinion of the court, which is reported in 39 Fed. Rep. 383.

Mr. Assistant Attorney General Whitney for plaintiff in error.

Mr. William A. Maury and *Mr. J. P. Tucker* for defendant in error.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

We are of opinion that the facts set forth in the special findings are not sufficient to support the judgment. The findings do not show what the collector charged the plaintiff; nor sufficiently describe the articles imported; nor does it appear from the record under what provisions of the tariff act of March 3, 1883, 22 Stat. 488, c. 121, the parties claimed respectively. The opinion might help the findings out, but cannot be resorted to for that purpose. *Dickinson* v. *Planters' Bank*, 16 Wall. 250.

We are unable, therefore, to direct judgment for either party. *Chesapeake Ins. Co.* v. *Stark*, 6 Cranch. 268, 273;

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Harden v. *Fisher*, 1 Wheat. 300, 303; *Barnes* v. *Williams*, 11 Wheat. 415; *McArthur* v. *Porter's Lessee*, 1 Pet. 626; *Ex parte French*, 91 U. S. 423; *Ryan* v. *Carter*, 93 U. S. 78, 81; *Hodges* v. *Easton*, 106 U. S. 408, 411; *Fort Scott* v. *Hickman*, 112 U. S. 150, 165; *Tyre & Spring Works Co.* v. *Spalding*, 116 U. S. 541, 545, 546; *Allen* v. *St. Louis Bank*, 120 U. S. 20, 30, 40; *Raimond* v. *Terrebonne Parish*, 132 U. S. 192; *Lloyd* v. *McWilliams*, 137 U. S. 576.

Judgment reversed and cause remanded for a new trial.

SEEBERGER *v.* HARDY.

SPALDING *v.* YOUNG.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Nos. 93, 276. Argued November 21, 1893. - Decided December 4, 1893.

In estimating the amount of duty to be imposed upon shell opera glasses under the tariff act of March 3, 1883, 22 Stat. 488, c. 121, the value of the materials should be taken at the time when they are put together to form the completed glass.

The question whether the opera glasses should be regarded as falling within the description of paragraph 216, as a manufacture composed wholly or in part of metal is not raised by the record, and, no instruction based upon that interpretation having been asked of the court below, this court does not find it necessary to express an opinion on the subject.

THESE were actions against the collector of the port of Chicago to recover duties claimed to have been erroneously assessed upon certain consignments of pearl opera glasses. The facts and the questions of law involved in the two actions were similar, except in some unimportant details. The opera glasses consisted of lenses in a metal frame, with an outer covering of shell. The question litigated was under which of the three following provisions of the tariff act of March 3,

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Statement of the Case.

1883, 22 Stat. 488, c. 121, were so-called shell opera glasses dutiable:

By paragraph 143, (page 497,) "Porcelain and Bohemian glass, chemical glassware, painted glassware, stained glass, and all other manufactures of glass, or of which glass shall be the component material of chief value, not specially enumerated or provided for in this act," were dutiable at 45 per cent *ad valorem*.

By paragraph 216, (page 501,) "Manufactures, articles, or wares, not specially enumerated or provided for in this act, composed wholly or in part of iron, steel, copper, lead, nickel, pewter, tin, zinc, gold, silver, platinum, or any other metal, and whether partly or wholly manufactured," were subject to 45 per cent *ad valorem*.

By paragraph 486, (page 514,) "Shells, whole or parts of, manufactured, of every description, not specially enumerated or provided for in this act," were dutiable at 25 per cent *ad valorem*.

As these opera glasses were made of a combination of three materials, namely, glass, metal, and shell, they were also claimed to be subject to Rev. Stat. § 2499, as amended by the said act of March 3, 1883, (page 491,) viz.: "On all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which the component material of chief value may be chargeable. If two or more rates of duty should be applicable to any imported article, it shall be classified for duty under the highest of such rates."

Upon the trial, certain depositions were offered in evidence tending to show the relative value of the component parts of which the opera glasses were made up, to the reading of which counsel for the defendant objected "upon the ground that the said depositions did not give in detail the values of the metal, shell, and glass, component parts of the pearl opera glasses in this suit, in the condition in which the opera glass manufacturer received them." The depositions were admitted and counsel excepted.

In this connection the court charged the jury that "in determining which of the materials (manufacture of metal,

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manufacture of shell, or manufacture of glass) composing the opera glasses in question was the component material of chief value, they must ascertain what were their values at the time they were in such condition that nothing remained to be done upon them except putting them together to make the perfected glasses." Defendant excepted to this instruction, and asked the court to charge "that in arriving at what was the component material of chief value in the said opera glasses, they should look and look only at the respective values of the metal, shell, and glass in the raw and unmanufactured state in which the opera glass manufacturer received them, and before their respective values had been enhanced by the manufacturer by means of any work, labor, or time expended thereon." This was refused. In each case the jury returned a verdict for the plaintiff importer, upon which judgment was entered, and the collector sued out this writ of error.

Mr. Assistant Attorney General Whitney for plaintiffs in error.

Mr. W. Wickham Smith for defendants in error. *Mr. Percy L. Shuman* was with him on the brief.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

These cases turn upon the question whether, in estimating the value of the component materials of which a certain manufactured article is made, the value of the materials shall be taken in the raw and unmanufactured condition in which the manufacturer receives them, and before their respective values have been enhanced by work expended upon them, or in the condition that nothing remains to be done upon them by the manufacturer except putting them together to make the completed glass.

It appeared the manufacturer bought the metal in the shape of ingots, the shell in the natural form of mother-of-pearl, and the glasses in the rough state in which they leave

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the cast. In neither case did the defendant introduce any testimony. Nothing, therefore, appears in the record as to the value of the materials when purchased appropriate to each opera glass. It is evident that the question involved is one of considerable importance, as in some articles, the raw material is the main cost, and in others, the labor.

We think the theory of the importer was the correct one, and that the value of the materials should be taken at the time they are put together to form the completed glass. There are grave difficulties in making the estimation at any other time. Whether, for instance, the shell shall be taken in its rough and uncleansed state as it comes from the animal, or after it has been cleaned and polished. Shall the glass be taken in its polished or unpolished state? Shall the value of the metal be taken immediately after it is smelted or in a more advanced state of manufacture? The position of the government seems to be that the value of the component materials should be taken as they go into the hands of the manufacturer. But one manufacturer may buy them in their rough state, another in their polished state, and another in their final state, ready to be put together in the form of a glass. The value of the raw material, as is shown in this case with respect to the shell and copper, may be subject to violent fluctuations. One manufacturer may have bought them at a high price, another at a low price, both being held a considerable time in stock. What price shall govern? Thus, in appraising the value of a piece of furniture made of wood and silk plush, it would be obviously inequitable to take the value of the lumber as it comes from the tree, and the silk from the worm or the spinner. The true rule would seem to be to take each of them as they go into the furniture.

While it may be true that to a certain extent the government may be at the mercy of the importers' witnesses in estimating the value of the labor put upon the raw material as it goes into the completed article, this difficulty cannot be allowed to defeat the plain object of the enactment. Such difficulties were doubtless foreseen, as they did not appear

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to be of such magnitude as to prevent Congress, in the act of 1890, from providing particularly that "the value of each component material shall be determined by the ascertained value of such material in its condition as found in the article," and thus putting the question at rest. We regard this as merely declaratory of the law.

There is another point raised in this case, namely, that the opera glasses should be regarded as falling within the description of paragraph 216, as a manufacture composed wholly or in part of metal, and, therefore, dutiable at 45 per cent *ad valorem*. As this question is not raised by the record, and no instruction was asked of the court based upon this interpretation, we do not find it necessary to express an opinion upon the subject.

The judgment of the court below in each case, is therefore,

Affirmed.

McALEER *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 108. Argued November 23, 1893. – Decided December 4, 1893.

An employé in the Treasury Department, having obtained letters patent for an invention which proved to be of use in the department, executed an indenture to the department in which he said: "For the sum of one dollar and other valuable consideration to me paid by the said department, I do hereby grant and license the said United States Treasury Department and its bureaus the right to make and use machines containing the improvements claimed in said letters patent to the full end of the term for which said letters patent are granted." *Held*, that this instrument constituted a contract fully executed on both sides, which gave the right to the Treasury Department, without liability for remuneration thereafter, to make and use the machines containing the patented improvements to the end of the term for which the letters were granted; which contract could not be defeated, contradicted, or varied, by proof of a collateral parol agreement inconsistent with its terms.

THIS was an appeal from a judgment of the Court of Claims, rendered March 31, 1890, dismissing the petition of one Philip

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Statement of the Case.

McAleer, whose administratrix was substituted in this court. The petition was filed November 27, 1888, "to recover from the United States compensation for the use by the United States of certain inventions made by the petitioner and protected by letters patent of the United States issued to him, such use being under licenses to the United States executed by petitioner." The several inventions and improvements for which letters patent were issued to petitioner were set out, and it was averred that "knowing that the said inventions and improvements so as aforesaid secured to the petitioner by letters patent were mainly and almost exclusively useful to the United States in the said Bureau of Engraving and Printing, the petitioner, at the request and by the advice of George B. McCartee, Esq., then superintendent of said bureau, for the United States executed and delivered to the said McCartee a license to the United States to use the petitioner's inventions aforesaid mentioned in letters patent No. 170,183, which was accepted by said McCartee for the United States, and under said license the United States continued thereafter to use said inventions." The license was then set out, and similar licenses were alleged to have been executed and delivered for the use by the United States of other inventions and improvements. The petition also averred that the United States advanced about the sum of two hundred dollars to be expended in procuring the issue of letters patent, "the officers of said bureau having urged the petitioner to have his aforesaid inventions and improvements protected by letters patent, with the view of securing to the United States, in the said Bureau of Engraving and Printing, by licenses as aforesaid, the exclusive use of the said inventions and improvements;" that at the time of the issue of the letters patent and of the execution of the licenses it was agreed between petitioner and the superintendent of the bureau in behalf of the United States that petitioner should be retained and employed in the bureau as machinist as long as the bureau continued to use said inventions or improvements, or any of them under the licenses; and that he was subsequently discharged. The petition further stated: "That under the aforesaid licenses there was an

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implied agreement between the United States and the petitioner that the United States should pay to the petitioner for the use of said improvements and inventions whatever the said use was reasonably worth, and the petitioner upon information and belief says that the said use was reasonably worth the sum of thirty-one thousand dollars ($31,000)."

The defendant pleaded the statute of limitations, the assignment for valuable consideration of the patented improvements, and want of novelty.

The case having been heard, the Court of Claims, upon the evidence, filed the following findings of fact and conclusion of law:

"1. Plaintiff is a citizen of the United States, a resident of the city of Washington, and a machinist by occupation.

"2. From the year 1864 until about the 16th day of February, 1876, plaintiff was employed as a mechanic in the Bureau of Engraving and Printing, formerly designated the currency division of the Treasury Department. His duties were those of a skilled mechanic, and during the greatest part of the time particularly related to the charge and repair of machines used in that bureau for cutting and trimming fractional currency, including machines of the character hereinafter mentioned.

"During eleven months, beginning in November, 1876, and ending about September 10, 1877, he was employed in said bureau and paid as a watchman. At the latter date he was discharged.

"3. December 7, 1875, letters patent No. 170,873, were issued to plaintiff for improvement in paper-perforating machines.

"4. Of the perforating machines described in the specifications accompanying letters patent 170,873, thirteen have been made for the use of the Bureau of Engraving and Printing, and that number of machines are now in use there, as are some 'pin machines.'

"5. The difference in operation between the plaintiff's invention for paper perforating and the machine known as the 'pin machine,' which it was designed to supersede, is in many

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respects in favor of the former. The speed of the former is greater than the latter; it will perforate more sheets per diem; the cost of constructing the knives is less than that of constructing the pins; the knife machine requires less repair than the pin machine. The pin machine does not punch entirely through the paper, but leaves a burr at the back, while the knife machine makes a clean cut, leaving no burr. This is the principal advantage of the knife machine and is a material one.

"6. Except as hereinafter found (see finding 9) plaintiff has received no compensation from the government for the use of his invention.

"7. January 10, 1876, plaintiff executed the instrument set forth at the close of this finding, which was recorded in the Patent Office, (Liber C 20, p. 40,) January 17, 1876.

"This assignment was made at the suggestion of George B. McCartee, then chief of the Bureau of Engraving and Printing.

"It was contemporaneously agreed by and between plaintiff and said McCartee that the assignment should hold good only during plaintiff's employment in said Bureau of Engraving and Printing, and not longer. Plaintiff was discharged from government service without fault on his part September, 1877, and his efforts to be restored have been fruitless.

"Plaintiff's request to have the machines in question stamped with his name as patentee was refused by the chief of the Bureau of Engraving and Printing.

"Whereas I, Philip McAleer, of Washington, D. C., have invented certain improvements in paper-perforating machines, for which letters patent of the United States were granted to me and bear date December 7, 1875;

"And whereas the United States Treasury Department is desirous of acquiring the right to use said invention as fully described in said letters patent:

"Now this indenture witnesseth, that for the sum of one dollar and other valuable consideration to me paid by the said department, I do hereby grant and license the said United

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States Treasury Department and its bureaus the right to make and use machines containing the improvements claimed in said letters patent to the full end of the term for which said letters patent are granted.

"Witness my hand and seal this 10th day of December, 1875.

"[L. S.] PHILIP MCALEER.

"Recorded Jan. 17, 1876.

"8. It was no part of plaintiff's official duty to make the said invention. In making it he used government material, but this was of trifling value; he made it partly out of office hours in the office, partly out of office hours at his home, and partly at such hours as he found leisure during office hours in the office.

"The device was to be applied to machines then under his charge as a machinist; it was made entirely with government tools and machinery; he was aided by government employés; the device was not used until 1879, when plaintiff was not in government employ; before it would operate the device required mechanical changes; these were made, and the device was perfected and applied by government machinists using government tools and material.

"9. Plaintiff received from the government wages as a machinist from some time in 1864 to February, 1876, inclusive, and as a watchman from November, 1876, to September, 1877, both inclusive. The government paid the Patent Office expenses and fees incident to the issue of the patent.

"10. The following assignment was made by plaintiff:"

[Here followed an assignment by McAleer to one Schneider.]

"11. Plaintiff's invention was applied as follows, to machines in the Bureau of Printing and Engraving: The first machine was completed in April, 1879; two in August, 1879; one in October, 1879; six at divers times between December 10, 1880, and February 18, 1881; one in April, 1881; two in the spring or summer of 1884. All of these machines are not in use at the same time. Each machine can separate about 8000 sheets a day.

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"12. The following are the specifications, claims, and drawings upon which plaintiff's patents issued, and specifications, claims, and drawings upon which patents were issued at the dates shown to the persons named therein."

[Here followed plaintiff's letters patent No. 170,873, dated December 7, 1875, application filed September 14, 1875, for "improvement in paper-perforating machines." Also letters patent No. 164,920, dated June 29, 1875, application filed June 9, 1875, for "improvement in rotary paper-cutters," to Agur Judson of Newark, N. J. Also letters patent to Merriam and Norton for "improved cutting machine," No. 55,336, dated June 5, 1866. Also letters patent to Alva Worden, of Michigan for "machine for cutting leather fly-nets," No. 41,459, dated February 2, 1864.]

"*Conclusion of law.* Upon the foregoing facts the court find as conclusion of law that the petition be dismissed."

The opinion, by Davis, J., is reported in 25 C. Cl. 238.

Mr. Tallmadge A. Lambert for appellant.

Mr. Assistant Attorney General Conrad for appellees.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

The Court of Claims held that this case fell within the rulings made by that court in *Solomons* v. *United States*, 22 C. Cl. 335, 342, and *Davis* v. *United States*, 23 C. Cl. 329. In the first of these cases, Clark, Solomons' assignor, chief of the Bureau of Engraving and Printing, was assigned the duty of devising a stamp, and did so. There was no agreement or understanding between the officers of the government and Clark concerning the right of the government to use the invention, or the remuneration, if any, which should be paid for it, and no express license to use the invention was given by him to the government, nor any notice prohibiting its use by intimating that he would demand a royalty. The Court of Claims held "that while the government did not obtain a specific interest in the patent, nor a monopoly of the invention, nor a right to share

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in the profits thereof, nor to exclude other persons from the use of it, nevertheless it acquired the right to manufacture and use the stamp in its revenue service without liability to the inventor."

In the second case, Davis was foreman of the machine and foundry division of the Ordnance Department of the Washington Navy Yard, and invented and received a patent for a vent-closing firing attachment. The cost of experiments was paid by the United States, and the patents were taken out under the advice of the chief of the Ordnance Bureau, and after they were issued the Navy Department paid him a sum of money to reimburse him for the expense incurred in securing them as a royalty for the right to their use. The Court of Claims held that he could not recover, and reiterated, as the principle announced in *Solomons' case*, "that every public officer being in some measure or degree a guardian of the public welfare, no transaction growing out of his official services or position can be allowed to enure to his personal benefit, and that from such transactions, as in the cases of guardian and ward, or trustee and *cestui que trust*, the law will not imply a contract."

It is argued that the devising of the stamp by Clark came within the scope of his official employment, and, similarly, that Davis was employed for the specific purpose of doing what in fact he accomplished in making his invention, while McAleer was not employed to invent and did not accept a royalty in satisfaction of his claims.

The case of Solomons subsequently came before this court, *Solomons* v. *United States*, 137 U. S. 342, 346, and the judgment of the Court of Claims was affirmed. Mr. Justice Brewer, delivering the opinion of the court, said: "If one is employed to devise or perfect an instrument, or a means for accomplishing a prescribed result, he cannot, after successfully accomplishing the work for which he was employed, plead title thereto as against his employer. That which he has been employed and paid to accomplish becomes, when accomplished, the property of his employer. Whatever rights as an individual he may have had in and to his

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inventive powers, and that which they are able to accomplish, he has sold in advance to his employer. So, also, when one is in the employ of another in a certain line of work, and devises an improved method or instrument for doing that work, and uses the property of his employer and the services of other employés to develop and put in practicable form his invention, and explicitly assents to the use by his employer of such invention, a jury, or a court trying the facts is warranted in finding that he has so far recognized the obligations of service flowing from his employment and the benefits resulting from his use of the property, and the assistance of the co-employés of his employer, as to have given to such employer an irrevocable license to use such invention." And *M'Clurg* v. *Kingsland*, 1 How. 202, was cited as decisive.

In the case at bar, as clearly summarized by the Court of Claims, the invention was made while petitioner was in the employment of the government as a skilled mechanic, whose duty it was to secure the most efficient service from the machines in his care, to keep them in repair, and to apply such improvements as experience might suggest. While so employed he devised the improvements in question, to be applied to the machines then under his charge as a machinist; doing the work largely in office hours and entirely with government tools and machinery; and he took out the patent at the solicitation of the bureau officers, and at the expense of the government. This was in 1875; he was discharged in 1877; the device was not used until 1879, and before it worked efficiently required certain mechanical changes, which were perfected and applied by government machinists, using government tools and material. Three days after the issue of the patent he executed the assignment set forth in the findings, whereby he covenanted, "for the sum of one dollar and other valuable consideration to me (him) paid" by the United States Treasury Department, that that department and its bureaus should have "the right to make and use machines containing the improvements claimed in said letters patent to the full end of the term for which said letters

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patent are granted." But it is said that there is a distinction between the right to use and the use of an invention, and that in this instance, while the right to use was absolute, the actual use was to be compensated for by the continuous employment of McAleer in accordance with a contemporaneous agreement to that effect between him and the superintendent of the bureau. We do not regard this position as tenable. The instrument constituted a contract fully executed on both sides, which gave the right to the Treasury Department, without liability for remuneration thereafter, to make and use the machines containing the patented improvement to the end of the term for which the letters were granted. It was a complete legal obligation in itself, with no uncertainty as to the object or extent of the engagement, and could not be defeated, contradicted, or varied by proof of any collateral parol agreement inconsistent with its terms. *Seitz* v. *Brewers' Refrigerating Machine Co.*, 141 U. S. 510.

The agreement that McAleer's "assignment should hold good only during plaintiff's employment in said Bureau of Engraving and Printing and not longer," was thus inconsistent and must be regarded as in defeasance and not as imposing a condition precedent to the use, the right to which had been completely granted for good and valuable consideration.

Moreover, the petition does not seek recovery for breach of any such collateral agreement, but proceeds upon an implied agreement under the licenses. We think the Court of Claims properly held that the case came within their previous rulings, which, as we have seen, were in accordance with the decisions of this court, and that the instrument executed by McAleer secured by covenant the right to use the device in the Treasury Department, which right would, under the circumstances, have otherwise been implied.

Judgment affirmed.

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POWELL v. BRUNSWICK COUNTY.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 898. Submitted November 20, 1893. — Decided December 4, 1893.

This court must determine for itself whether it has jurisdiction under Rev. Stat. § 709, to review the judgment of a state court; and the certificate of the presiding judge of the State that a state of case exists for the interposition of this court cannot, of itself, confer jurisdiction upon it to reëxamine a judgment of that court.

It is essential to the maintenance of the jurisdiction over the judgment of the state court upon the ground of erroneous decision as to the validity of a state statute or a right under the Constitution of the United States, that it should appear from the record that the validity of such statute was drawn in question, as repugnant to the Constitution, and that the decision sustained its validity, or that the right was specially set up or claimed, and denied.

It is well settled that the construction put upon a state statute by the highest court of the State will generally be followed by this court, unless it conflicts with the constitution, or a Federal statute, or a general rule of commercial law.

Applying these rules it was *held* that the construction put by the Supreme Court of Appeals of the State of Virginia in *Taylor* v. *Supervisors*, 86 Virginia, 506 upon the provision in the charter of the Atlantic and Danville Railway Company considered in this suit, leaves no Federal question for this court.

MOTION to dismiss. This was a bill of complaint filed by R. S. Powell and fourteen others, resident citizens and taxpayers of the county of Brunswick, suing on behalf of themselves and all other citizens and taxpayers of the county, making themselves parties, March 25, 1889, in the Circuit Court of the county of Brunswick, in the State of Virginia, against the board of supervisors of that county and the Atlantic and Danville Railway Company, to enjoin the disposition of certain bonds of the county, theretofore issued to the company; the doing of any act by means whereof the county might become bound as a subscriber to the capital stock of the company; and to adjudge all the proceedings of every kind whereby it had been attempted to bind the county as such subscriber to be irregular, null, and void.

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Statement of the Case.

Under an act of the general assembly of Virginia, approved April 21, 1882, the Atlantic and Danville Railway Company was chartered and authorized to construct a line of road from a point on the James River, in Surry County, by a designated route to the city of Danville, and it was provided that certain designated counties (including the county of Brunswick) along the proposed road might subscribe to the capital stock of the company. At a general election held on the fourth Thursday, being the 24th day of May, 1883, the question of subscription was submitted to a vote of the qualified voters of the county, under an order of the county court, "in accordance with the provisions of sections 62 and 63, chapter 61, Code of Virginia, 1873," and return having been made by the judges of election to the court, commissioners were appointed to canvass with the clerk the ballots and report thereon.

The board discharged this duty, canvassed the ballots, reported the result, and further reported "that three-fifths of the qualified voters of the county voting upon the question were in favor of subscription, and that said three-fifths includes a majority of the votes cast by freeholders at the election and a majority of the registered voters of the county." This report was returned to the office of the county clerk and admitted to record June 13, 1883.

By an act of the general assembly of Virginia of January 15, 1875, (Sess. Laws Va. 1874, 1875, p. 29, c. 37,) it was provided that whenever the sense of the qualified voters of any county should be taken on the question of whether the board of supervisors should subscribe to the stock of any internal improvement company, the returns of such elections or the decision of the voters should be subject to the inquiry, determination, and judgment of the county court upon the written complaint of fifteen or more of the qualified voters of the county of an undue election or false return, to be filed within thirty days after the election, and the court to proceed upon the merits and to determine concerning the same according to the constitution and laws of the State. Such a complaint was filed in reference to this vote, June 21; amended; and as amended quashed on June 27, 1883, and on the same day the

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county court ordered the board of supervisors to meet July 3, 1883, to carry the wishes of the voters into effect. The meeting was accordingly held on that day and subscription made to the amount of thirty-five hundred dollars per mile for every mile of main line constructed within the county, to be paid in county bonds, payable twenty-five years after date, with interest at six per cent.

Bonds to the amount of seventeen thousand five hundred dollars were issued and delivered to the company January 21, 1889, and application was made in March, 1889, for additional bonds when the complainants filed the bill in question, alleging therein that a large number of the voters of the county were induced to vote for the subscription by false and fraudulent representations made on behalf of the company; that there were gross frauds and irregularities in conducting the election and making the returns, induced by the fraudulent acts of the company, and participated in by the officers of election; that the company was never duly organized and was incapable of making a contract of subscription; that the act incorporating the company was void because in conflict with certain provisions of the state constitution; and averring the illegality of the subscription on other grounds in respect of the charter, amendments thereto, and proceedings thereunder.

The defendant company demurred, and also answered, denying all the allegations of the bill, and alleging the final disposition of most of them adversely to complainants in *Taylor* v. *Supervisors*, 86 Virginia, 506.

The cause having come on for hearing resulted in a decree dismissing the bill. An appeal was taken to the Supreme Court of Appeals of the State, allowed on petition duly presented, and the decree of the Circuit Court was affirmed. Appellants thereupon applied to the president of the Court of Appeals for a writ of error to this court, which was allowed, together with a certificate "that the Federal questions presented by the assignment of errors in the foregoing petition were duly raised by the assignment of errors made and argued by the petitioners in the said Supreme Court of Appeals, (the said Supreme Court of Appeals being the highest court of law

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or equity in Virginia in which a decision can be had in said suit,) and that a decision of the said Federal questions was necessary to the determination of said suit and [they] were actually decided by the said Supreme Court of Appeals of Virginia." The opinion of that court is set forth in the record and is reported in 88 Virginia, 707.

The ninth and tenth sections of the act under which the defendant company was incorporated are as follows:

"9. The following counties through which the said railway shall be constructed, to wit: Brunswick, Greensville, Mecklenburg, Surry and Sussex, are hereby authorized to subscribe, according to the forms prescribed by the Code of Virginia of eighteen hundred and seventy-three, to the capital stock of the said Atlantic and Danville Railway Company, to an amount not exceeding thirty-five hundred dollars per mile, for each and every mile of railroad the said company may construct within the limits of the said counties respectively; provided that no part of said subscription made by any of the said counties shall be due or payable until it shall be certified that one mile or more of the said railroad shall have been graded, and the track laid thereon in accordance with the provisions of the tenth section of this act.

"10. That it shall be the duty of the county courts of the several counties named in the preceding section of this act, at the request of the said railway company, or the board of supervisors of any of the said counties, to appoint a commissioner, who, after the commencement of the work of construction in the county, by the said company, shall report to the county court, upon each court day, the number of miles of railroad which the said company has graded and laid the track thereon. Said report shall be certified at once to the board of supervisors of the county, and thereupon the said board of supervisors shall issue or cause to be issued and deliver to the said railway company, bonds of the county, bearing interest not exceeding six per centum per annum, of such denominations as the said railway company may desire, in payment for said subscription for every mile of railroad which, by said report, appears to be graded, and to have the

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track substantially laid thereon. The compensation of said commissioners shall be fixed by the courts appointing the same, and shall be paid by the Atlantic and Danville Railway Company." Sess. Laws Va. 1881, 1882, c. 95, pp. 468, 469.

Section 62 of chapter 61 of the Code of Virginia of 1873, applying to "subscriptions by counties, cities, and towns to works of internal improvements," reads thus:

"The county court of any county, or the common council, or board of trustees, of any city or town, or township board of any township, in this Commonwealth, may make an order requiring the sheriff or sergeant, and commissioners of election, at the next general election for state, city, town or county, or township officers, or at any other time, not less than thirty days from the date of said order, which shall be designated therein, to open a poll, and take the sense of the qualified voters, on the question, whether the board of supervisors, council, or board of trustees, or township board, shall subscribe to the stock of any internal improvement company, named in the order, which has been incorporated by the general assembly. The said order shall state the maximum amount proposed to be subscribed, which shall in no case exceed one-fifth of the total capital stock of said company, or an amount, the interest upon which, at the rate authorized by the council, or board of trustees, of any city or town, or board of supervisors of any county, or township board of any township, shall not require the imposition of an annual tax in excess of twenty cents on the one hundred dollars: provided, That the bonds issued by any county, city or town, or township, subscribed to any internal improvement company, shall be received by such company at their par value."

As to counties, by section 63 commissioners of elections, "if there be none otherwise legally appointed," were to be designated to open polls and conduct the election as provided by law in other elections, and the votes for and against subscription were to be counted and return made to the judge of the county court, and the ballots deposited with the clerk of that court, and the clerk and citizens appointed by the judge

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were constituted a board whose duty it was to canvass the ballots and make report as prescribed.

By section 64, if it appeared from the report that three-fifths of the qualified voters of the county, voting upon the question, were in favor of subscription, and that said three-fifths included a majority of the votes cast by free-holders at such election, and a majority of the registered voters of the county, the county court was directed to enter of record an order requiring the supervisors of the county "to attend on a day and at a place named in the order, to carry out the wishes of the voters, as expressed at said election."

Under section 65 the board of supervisors were to determine what amount of the capital stock, not exceeding the maximum, should be subscribed for on behalf of the county, to enter the amount on record, and to appoint an agent or agents to make the subscription; which subscription should be paid in such instalments as agreed upon by the board or called for by the company.

By section 66 it was provided that:

"For the purpose of paying the quotas on said stock, or the said instalments, as they may be called for, as fall due, the board of supervisors . . . shall have power to appoint an agent or agents to negotiate a loan or loans, and to issue bonds to secure the payment of the same, for and in the name of said county, . . . which may be either registered or coupon, as may be prescribed; and when the levy is made, . . . in said county, . . . a tax shall be levied on all property liable to state tax in such county, . . . to pay the amount of such subscription or of such loan, and interest thereon, or to pay the interest on the bonds so issued, and to create a sinking fund to redeem the principal thereof, as the authority ordering the levy or tax may deem necessary or proper; and from year to year said levy or assessment shall be made until the debt and interest are paid. But such levy or assessment for a year shall not exceed one-tenth of the whole amount of such subscription, with the interest thereon." Code Virginia, 1873, pp. 593, 594, 595.

Chapter VIII of the code treated of general and special

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elections and the conduct and notice thereof. General elections were to be held throughout the State on the fourth Thursday in May and on the first Tuesday after the first Monday in November in each year.

Mr. Richard Walker and *Mr. Richard B. Davis* for the motion.

Mr. E. P. Buford opposing.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

The determination of the jurisdiction of this court to review the judgment of a state court under section seven hundred and nine of the Revised Statutes necessarily devolves upon the court itself, and, while the certificate of the presiding judge of the state court as to the existence of the state of case upon which our interposition may be successfully invoked is always regarded with respect, it cannot confer jurisdiction upon this court to reëxamine the judgment below. *Lawler* v. *Walker*, 14 How. 149; *Railway Company* v. *Rock*, 4 Wall. 477; *Parmelee* v. *Lawrence*, 11 Wall. 36; *Caperton* v. *Bowyer*, 14 Wall. 216; *Brown* v. *Atwell*, 92 U. S. 327; *Gross* v. *United States Mortgage Co.*, 108 U. S. 477; *Felix* v. *Scharnweber*, 125 U. S. 54; *Roby* v. *Colehour*, 146 U. S. 153.

In *Parmelee* v. *Lawrence*, Mr. Justice Nelson, speaking for the court, said: "We will add, if this court should entertain jurisdiction upon a certificate alone in the absence of any evidence of the question in the record, then the Supreme Court of the State can give the jurisdiction in every case where the question is made by counsel in the argument. The office of the certificate, as it respects the Federal question, is to make more certain and specific what is too general and indefinite in the record, but is incompetent to originate the question within the true construction of the 25th section."

As many times reiterated, it is essential to the maintenance of jurisdiction upon the ground of erroneous decision as to the validity of a state statute or a right under the Constitution of the United States, that it should appear from the record that

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the validity of such statute was drawn in question as repugnant to the Constitution and that the decision sustained its validity, or that the right was specially set up or claimed and denied. If it appear from the record by clear and necessary intendment that the Federal question must have been directly involved so that the state court could not have given judgment without deciding it, that will be sufficient; but resort cannot be had to the expedient of importing into the record the legislation of the State as judicially known to its courts, and holding the validity of such legislation to have been drawn in question, and a decision necessarily rendered thereon, in arriving at conclusions upon the matters actually presented and considered.

A definite issue as to the validity of the statute or the possession of the right must be distinctly deducible from the record before the state court can be held to have disposed of such a Federal question by its decision.

The bill of complaint in this case nowhere claimed relief by reason of any right, title, privilege, or immunity under the Constitution of the United States, or because of the violation by the proceedings in reference to the subscription of any provision of that Constitution, nor did the petition in error to the Court of Appeals suggest any Federal question, but in a supplemental brief, filed in that court, it was urged that by section nine of the charter of the railway company the designated counties were authorized to subscribe "according to the forms prescribed by the Code of Virginia of eighteen hundred and seventy-three;" that these "forms" were set forth in sections 62, 63, and 64 of chapter 61 of that code; and that by subscription thereunder the property owners of the county would be deprived of their property "without due process of law," in violation of the Fourteenth Amendment, for want of provision in those sections requiring notice of the election to be given to the voters. The argument seems to have been that those sections of the code must be read into section nine; that a valid subscription could not be made without a vote had as therein prescribed; and that, irrespective of whether the vote was taken at a general election or upon notice of the special matter actually given, as notice was not provided for,

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the sections were void and no subscription could be made at all.

The difficulty with this contention is that the Supreme Court of Appeals has otherwise construed section 9 of the railroad charter.

In *Taylor* v. *Supervisors*, 86 Virginia, 506, 510, which was the case of a bill filed by the citizens of Greensville County, one of the counties designated in the ninth section, to contest the validity of the subscription of that county, the point was raised and pressed that section 62 was included in the "forms" referred to in the ninth section, but the court decided to the contrary, and, speaking through Hinton, J., said: "The provisions of sec. 62, ch. 61, Code 1873, seem to have been mainly designed to give to the people a definite idea of what is proposed to be done in behalf of the county, and to fix a limit beyond which generally the power to subscribe shall not be exercised. These objects, however, the legislature has evidently seen fit to accomplish, so far as they were practicable, by the provisions of this charter, and we must hold, therefore, that that section of the code has no application to the case. But what, then, are the 'forms prescribed' by the Code of 1873, which the charter directs shall be observed in making this subscription? Why, manifestly, the forms given in sections 65 and 66, ch. 61, Code under the heading 'If subscriptions be voted for, how it is to be made,' etc. In other words, the forms prescribed by the Code of 1873, according to which the subscription is to be made, are those which are to be observed in making the subscription after the voters have declared at the polls that the subscription shall be made." That decision was approved and followed in the case under consideration, the court saying: "The case of *Taylor* v. *The Board of Supervisors of Greensville County*, *supra*, was a controversy arising concerning this same railroad in its construction through the county of Greensville; the identical questions raised here were raised there as to the irregularities of the organization and the subscription of that county, and especially the excess of the subscription in the aggregate, when computing it at the sum of $3500 per mile, as compared to the provisions of the general

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law, as set forth in section 62 of chapter 61 of the Code of 1873. But Judge Hinton sufficiently disposes of this objection and apparent difficulty by pointing out that the proceedings here were by virtue of a special act of assembly upon this very subject, passed not only subsequently to the code, but enacted to govern this particular case. The questions raised as to the election are considered and disposed of there, and furnish reasons satisfactory as to this case."

The Fourteenth Amendment was not referred to by the court, and although the conclusion of the opinion, that "on all other questions we are of opinion to affirm the decree appealed from," is broad enough to cover the objection that the statute was in conflict with the Constitution of the United States, we presume that allusion to the subject was thought unnecessary in view of the settled construction of the railroad charter to the contrary of that upon which the supposed conflict depended.

As to that construction, we perceive no reason for declining to accept it in accordance with the general rule applicable to the decisions of the highest court of a State in reference to the laws of the State. *Gormley* v. *Clark*, 134 U. S. 338, 348.

Writ of error dismissed.

HICKS *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

No. 971. Submitted November 16, 1893. — Decided November 27, 1893.

H. was indicted jointly with R. for the murder of C. Before the day of trial R. was killed, whereupon H. was tried separately. It was clearly proved at the trial that H. did not kill C. nor take any part in the physical struggle which resulted in his death at the hands of R. There was evidence tending to show that by his language and gestures H. abetted R., but this evidence was given by persons who stood at some distance from the scene of the crime. H. denied having used such language, or any language with an intent to participate in the murder, and insisted that what he had said had been said under the apprehension that R., who

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Statement of the Case.

was in a dangerous mood, was about to shoot him (H.). The court instructed the jury that it was proved beyond controversy that R. fired the gun, and continued: "If the defendant was actually or constructively present at that time, and in any way aided or abetted by word or by advising or encouraging the shooting of C. by R., we have a condition which under the law puts him present at the place of the crime; and if the facts show that he either aided or abetted or advised or encouraged R., he is made a participant in the crime as thoroughly and completely as though he had with his own hand fired the shot which took the life of the man killed The law further says that if he was actually present at that place at the time of the firing by R. and he was there for the purpose of either aiding, abetting, advising, or encouraging the shooting of C. by R., and that as a matter of fact he did not do it, but was present at the place for the purpose of aiding or abetting or advising or encouraging his shooting, but he did not do it because it was not necessary, it was done without his assistance, the law says there is a third condition where guilt is fastened to his act in that regard." *Held*, that this instruction was erroneous in two particulars:

(1) It omitted to instruct the jury that the acts or words of encouragement and abetting must have been used by the accused with the intention of encouraging and abetting R.;

(2) Because the evidence, so far as the court is permitted to notice it, as contained in the bills of exception, and set forth in the charge, shows no facts from which the jury could have properly found that the rencounter was the result of any previous conspiracy or arrangement.

Under the provisions in the act of March 16, 1878, 20 Stat. 30, c. 37, H. at the trial offered himself as a witness in his own behalf. In charging the jury the court said: "The defendant has gone upon the stand in this case and made his statement. You are to weigh its reasonableness, its probability, its consistency, and above all you consider it in the light of the other evidence, in the sight of the other facts. If he is contradicted by other reliable facts, that goes against him, goes against his evidence. You may explain it perhaps on the theory of an honest mistake or a case of forgetfulness, but if there is a conflict as to material facts between his statements and the statements of the other witnesses who are telling the truth, then you would have a contradiction that would weigh against the statements of the defendant as coming from such witnesses." *Held*, that this was error, as it tended to defeat the wise and humane provision of the law that "the person charged shall, at his own request, but not otherwise, be a *competent* witness."

The exception to the judge's charge does not embrace too large a portion of it, and is not subject to the often sustained objection, of not being sufficiently precise and pointed to call the attention of the judge to the particular error complained of.

THE case is stated in the opinion.

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Mr. A. H. Garland for plaintiff in error.

Mr. Assistant Attorney General Conrad for defendants in error.

Mr. Justice Shiras delivered the opinion of the court.

In the Circuit Court of the United States for the Western District of Arkansas, John Hicks, an Indian, was jointly indicted with Stand Rowe, also an Indian, for the murder of Andrew J. Colvard, a white man, by shooting him with a gun on the 13th of February, 1892. Rowe was killed by the officers in the attempt to arrest him, and Hicks was tried separately and found guilty in March, 1893. We adopt the statement of the facts in the case made in the brief for the government as correct and as sufficient for our purposes:

"It appears that on the night of the 12th of February, 1892, there was a dance at the house of Jim Rowe, in the Cherokee Nation; that Jim Rowe was a brother to Stand Rowe, who was indicted jointly with the defendant; that a large number of men and women were in attendance; that the dance continued until near sunrise the morning of the 13th; that Stand Rowe and the defendant were engaged in what was called 'scouting,' viz., eluding the United States marshals who were in search of them with warrants for their arrest, and were armed for the purpose of resisting arrest; they appeared at the dance, each armed with a Winchester rifle; they were both Cherokee Indians. The deceased, Andrew J. Colvard, was a white man who had married a Cherokee woman; he had been engaged in the mercantile business in the Cherokee country until a few months before the homicide; he came to the dance on horseback on the evening of the 12th. A good deal of whiskey was drank during the night by the persons present, and Colvard appears to have been drunk at some time during the night. Colvard spoke Cherokee fluently, and appears to have been very friendly with Stand Rowe and the defendant Hicks.

"On the morning of the 13th, as the party were dispersing,

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Colvard invited Stand Rowe and Hicks to go home with him, and repeated frequently this invitation. Finally, he offered as an inducement to Stand Rowe, if he would accompany him home, to give him a suit of clothes, and a hat and boots. The urgency of these invitations appears to have excited the suspicion of the plaintiff in error, who declared, openly, that if Colvard persisted in his effort to take Stand Rowe away with him he would shoot him.

"Some time after sunrise on the morning of the 13th, about 7 o'clock, S. J. Christian, Benjamin F. Christian, Wm. J. Murphy, and Robert Murphy, all of whom had been at the dance the night before and had seen there Colvard, Stand Rowe, and the defendant, were standing on the porch of the house of William J. Murphy, about 414 steps west from the house of Jim Rowe, and saw Stand Rowe, coming on horseback in a moderate walk, with his Winchester rifle lying down in front of him, down a 'trail,' which led into the main travelled road. Before Stand Rowe appeared in sight the men who were on the porch had heard a 'whoop' in the direction from which Stand Rowe came, and this 'whoop' was responded to by one from the main road in the direction of Jim Rowe's house. Stand Rowe halted within five or six feet of the main road, and the men on the porch saw Mr. Colvard and the defendant Hicks riding together down the main road from the direction of Jim Rowe's house.

"As Colvard and Hicks approached the point where Stand Rowe was sitting on his horse, Stand Rowe rode out into the road and halted. Colvard then rode up to him in a lope or canter, leaving Hicks, the defendant, some 30 or 40 feet in his rear. The point where the three men were together on their horses was about 100 yards from where the four witnesses stood on the porch. The conversation between the three men on horseback was not fully heard by the four men on the porch, and all that was heard was not understood, because part of it was carried on in the Cherokee tongue; but some part of this conversation was distinctly heard and clearly understood by these witnesses; they saw Stand Rowe twice raise his rifle and aim it at Colvard, and twice he lowered it; they

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heard Colvard say, 'I am a friend to both of you;' they saw and heard the defendant Hicks laugh aloud when Rowe directed his rifle toward Colvard; they saw Hicks take off his hat and hit his horse on the neck or shoulder with it; they heard Hicks say to Colvard, 'Take off your hat and die like a man;' they saw Stand Rowe raise his rifle for the third time, point it at Colvard, fire it; they saw Colvard's horse wheel and run back in the direction of Jim Rowe's house, 115 or 116 steps; they saw Colvard fall from his horse; they went to where he was lying in the road and found him dead; they saw Stand Rowe and John Hicks ride off together after the shooting."

Hicks testified in his own behalf, denying that he had encouraged Rowe to shoot Colvard, and alleging that he had endeavored to persuade Rowe not to shoot.

At the trial the government's evidence clearly disclosed that John Hicks, the accused, did not, as charged in the indictment, shoot the deceased, nor take any part in the physical struggle. To secure a conviction it hence became necessary to claim that the evidence showed such participation in the felonious shooting of the deceased as to make the accused an accessory, or that he so acted in aiding and abetting Rowe as to make him guilty as a principal. The prosecution relied on evidence tending to show that Rowe and Hicks coöperated in inducing Colvard to leave the house, where they and a number of others had passed the night in a drunken dance, and to accompany them up the road to the spot where the shooting took place. Evidence was likewise given by two or three men, who, from a house about one hundred yards distant, were eyewitnesses of the occurrence, that the three men were seated on their horses a few feet apart; that Rowe twice raised his gun and aimed at Colvard; that Hicks was heard to laugh on both occasions; that Rowe thereupon withdrew his gun; that Hicks pulled off his hat, and, striking his horse with it, said to Colvard: "Pull off your hat and die like a man;" that thereupon Rowe raised his gun a third time and fired at Colvard, whose horse then ran some distance before Colvard fell. As the horse ran, Rowe fired a second time. When Colvard's

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body was subsequently examined it was found that the first bullet had passed through his chest, inflicting a fatal wound, and that the second had not taken effect.

The language attributed to Hicks, and which he denied having used, cannot be said to have been entirely free from ambiguity. It was addressed not to Rowe, but to Colvard. Hicks testified that Rowe was in a dangerous mood, and that he did not know whether he would shoot Colvard or Hicks. The remark made — if made — accompanied with the gesture of taking off his own hat, may have been an utterance of desperation, occasioned by his belief that Rowe would shoot one or both of them. That Hicks and Rowe rode off together after seeing Colvard fall was used as a fact against Hicks, pointing to a conspiracy between them. Hicks testified that he did it in fear of his life; that Rowe had demanded that he should show him the road which he wished to travel. Hicks further testified, and in this he was not contradicted, that he separated from Rowe a few minutes afterwards, on the first opportunity, and that he never afterwards had any intercourse with him, nor had he been in the company of Rowe for several weeks before the night of the fatal occurrence.

Two of the assignments of error are especially relied on by the counsel of the accused. One arises out of that portion of the charge wherein the judge sought to instruct the jury as to the evidence relied on as showing that Hicks aided and abetted Rowe in the commission of the crime. The language of the learned judge was as follows:

"We are to proceed then to see whether the defendant was a party to the killing — that is, whether he was connected with it, or so aided or assisted in producing the act, as under the law he is responsible by the rules of the law for that act, as well as the man who fired the fatal shot if he were alive. We go to the first proposition where the crime of murder has been committed, which asserts that he who with his own hand did the act which produced the result is guilty. The second proposition is, that if at the time that Andrew J. Colvard was shot by Stand Rowe, the defendant was present at that time and at the place of shooting, that, of course,

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would not alone make him guilty — the mere fact that he was present. Yet it is an element that we are to take into consideration to see whether his connection with the killing was such that he is guilty of the crime, because he could not be guilty unless present actually or constructively. Then we are to see whether he was present at the place of the killing. That does not mean that he had to be right at the man who was shot, right by the side of Stand Rowe, but that he was so near to that place as that he could in some way contribute to the result that was produced by some act done by him or by some words spoken by him. First, then, we inquire if he was present at the place of the shooting, and then while so present whether he aided, abetted, or advised, or encouraged the shooting of Andrew J. Colvard by Stand Rowe. Now, that is the second proposition I have asserted. Stand Rowe, as the proofs show beyond controversy, (and when the proof shows anything beyond controversy I may allude to it in that way,) is the man who fired the gun. If the defendant was actually or constructively present at that time, and in any way aided or abetted by word or by advising or encouraging the shooting of Colvard by Stand Rowe, we have a condition which under the law puts him present at the place of the crime; and if the facts show that he either aided or abetted or advised or encouraged Stand Rowe, he is made a participant in the crime as thoroughly and completely as though he had with his own hand fired the shot which took the life of the man killed. That is the second condition. The law further says that if he was actually present at that place at the time of the firing by Stand Rowe, and he was there for the purpose of either aiding, abetting, advising, or encouraging the shooting of Andrew J. Colvard by Stand Rowe, and that as a matter of fact he did not do it, but was present at the place for the purpose of aiding or abetting or advising or encouraging his shooting, but he did not do it because it was not necessary, it was done without his assistance, the law says there is a third condition where guilt is fastened to his act in that regard."

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We agree with the counsel for the plaintiff in error in thinking that this instruction was erroneous in two particulars. It omitted to instruct the jury that the acts or words of encouragement and abetting must have been used by the accused with the intention of encouraging and abetting Rowe. So far as the instruction goes, the words may have been used for a different purpose, and yet have had the actual effect of inciting Rowe to commit the murderous act. Hicks, indeed, testified that the expressions used by him were intended to dissuade Rowe from shooting. But the jury were left to find Hicks guilty as a principal because the effect of his words may have had the result of encouraging Rowe to shoot, regardless of Hicks' intention. In another part of the charge the learned judge did make an observation as to the question of intention in the use of the words, saying: "If the deliberate and intentional use of words has the effect to encourage one man to kill another, he who uttered these words is presumed by the law to have intended that effect, and is responsible therefor." This statement is itself defective in confounding the intentional use of the words with the intention as respects the effect to be produced. Hicks no doubt *intended* to use the words he did use, but did he thereby *intend* that they were to be understood by Rowe as an encouragement to act? However this may be, we do not think this expression of the learned judge availed to cure the defect already noticed in his charge, that the mere use of certain words would suffice to warrant the jury in finding Hicks guilty, regardless of the intention with which they were used.

Another error is contained in that portion of the charge now under review, and that is the statement "that if Hicks was actually present at that place at the time of the firing by Stand Rowe, and he was there for the purpose of either aiding, abetting, advising, or encouraging the shooting of Andrew J. Colvard by Stand Rowe, and that, as a matter of fact, he did not do it, but was present for the purpose of aiding or abetting or advising or encouraging his shooting, but he did not do it because it was not necessary, it was done without his assistance,

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the law says there is a third condition where guilt is fastened to his act in that regard."

We understand this language to mean that where an accomplice is present for the purpose of aiding and abetting in a murder, but refrains from so aiding and abetting because it turned out not to be necessary for the accomplishment of the common purpose, he is equally guilty as if he had actively participated by words or acts of encouragement. Thus understood, the statement might, in some instances, be a correct instruction. Thus, if there had been evidence sufficient to show that there had been a previous conspiracy between Rowe and Hicks to waylay and kill Colvard, Hicks, if present at the time of the killing, would be guilty, even if it was found unnecessary for him to act. But the error of such an instruction, in the present case, is in the fact that there was no evidence on which to base it. The evidence, so far as we are permitted to notice it, as contained in the bills of exception, and set forth in the charge, shows no facts from which the jury could have properly found that the rencounter was the result of any previous conspiracy or arrangement. The jury might well, therefore, have thought that they were following the court's instructions, in finding the accused guilty because he was present at the time and place of the murder, although he contributed neither by word or action to the crime, and although there was no substantial evidence of any conspiracy or prior arrangement between him and Rowe.

Another assignment seems to us to present a substantial error. This has to do with the instructions by the learned judge to the jury, on the weight which they should give to the testimony of the accused in his own behalf. Those instructions were in the following words:

"The defendant has gone upon the stand in this case and made his statement. You are to weigh its reasonableness, its probability, its consistency, and above all you consider it in the light of the other evidence, in the light of the other facts. If he is contradicted by other reliable facts, that goes against him, goes against his evidence. You may explain it perhaps on the theory of an honest mistake or a case of forgetfulness,

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but if there is a conflict as to material facts between his statements and the statements of the other witnesses who are telling the truth, then you would have a contradiction that would weigh against the statements of the defendant as coming from such witnesses. You are to consider his interest in this case; you are to consider his consequent motive growing out of that interest in passing upon the truthfulness or falsity of his statement. He is in an attitude, of course, where any of us, if so situated, would have a large interest in the result of the case, the largest, perhaps, we could have under any circumstances in life, and such an interest, consequently, as might cause us to make statements to influence a jury in passing upon our case that would not be governed by the truth; we might be led away from the truth because of our desire. Therefore it is but right, and it is your duty to view the statements of such a witness in the light of his attitude and in the light of other evidence."

The learned judge therein suggests to the jury that there was or might be "a conflict as to material facts between the statements of the accused and the statements of the other witnesses who are telling the truth," and that "then you would have a contradiction that would weigh against the statements of the defendant as coming from such witnesses."

The obvious objection to this suggestion is in its assumption that the other witnesses, whose statements contradicted those of the accused, were "telling the truth."

The learned judge further, in this instruction, argued to the jury that, in considering the personal testimony of the accused, they should consider "his interest in this case." "You are to consider his consequent motive growing out of that interest in passing upon the truthfulness or falsity of his statement. He is in an attitude, of course, where any of us, if so situated, would have a large interest in the result of the case, the largest, perhaps, we could have under any circumstances in life, and such an interest consequently as might cause us to make statements to influence a jury in passing upon our case that would not be governed by the truth; we might be led away from the truth because of our desire. Therefore it is

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but right, and it is but your duty to review the statements of such a witness in the light of his attitude, and in the light of the other evidence."

It is not easy to say what effect this instruction had upon the jury. If this were the only objectionable language contained in the charge, we might hesitate in saying that it amounted to reversible error. It is not unusual to warn juries that they should be careful in giving effect to the testimony of accomplices; and, perhaps, a judge cannot be considered as going out of his province in giving a similar caution as to the testimony of the accused person. Still it must be remembered that men may testify truthfully, although their lives hang in the balance, and that the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, to whose lightest word the jury, properly enough, give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability. The wise and humane provision of the law is that "the person charged shall, at his own request, but not otherwise, be a *competent* witness." The policy of this enactment should not be defeated by hostile comments of the trial judge, whose duty it is to give reasonable effect and force to the law.

These strictures cannot be regarded as inappropriate when the facts of the present case are considered. The only substantial evidence against the accused, on which the jury had a right to find him guilty, was that of witnesses who testified to words used by him at a distance of not less than one hundred yards. Apart from the language so attributed to him, there was no evidence that would have warranted a jury in condemning him. His denial of his use of the words and his explanation of his conduct should, we think, have been submitted to the jury as entitled to the most careful consideration. There was nothing intrinsically improbable in his statements; and it is not without significance that the inculpatory words were not testified to by the witnesses at the preliminary examination before the commissioner when the incident was fresh in their recollection.

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It is urged in the brief filed for the government that the exception which is the subject of the first assignment of error should not be considered by this court because it embraces too large a portion of the judge's charge, and cases are cited in which this court has censured wholesale exceptions to a charge. It is justly said that the exception ought to be so precise and pointed as to call the attention of the judge to the particular error complained of, so as to afford him an opportunity to correct any inadvertence, in form or substance, into which he may have fallen. And it is further said that the revising court ought not to be compelled to search through long passages in an exception to reach errors that may be contained therein.

Conceding that such criticisms have often been justly made, we yet think that they do not apply to the exception under consideration. To enable us to form a just view of the error complained of, it was necessary, or at least useful, to cite the entire passage of the charge that covered it. To have selected certain obnoxious sentences as the subject of special exceptions might have justified the very opposite criticism, that the omitted context would have explained or nullified the error.

The learned judge below seems to have been satisfied with the shape in which the exceptions were presented to him, and we think they sufficiently raise the questions we have considered.

The judgment of the court below is

Reversed and the cause remanded, with directions to set aside the verdict and award a new trial.

MR. JUSTICE BREWER, with whom concurred MR. JUSTICE BROWN, dissenting.

I dissent from the opinion and judgment of the court in this case. It seems to me that the opinion proceeds in disregard of rules long ago established in regard to the conditions under which an appellate court will review the instructions given on the trial. Take the first matter referred to in the opinion. A page or so of the court's charge is excepted

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to, and the exception is taken in this way: "To the giving of which charge to the jury the defendant at the time excepted." No particular sentence or proposition on this page is excepted to; no ground of objection is noted; the attention of the trial court is not directed to any matter, whether of statement or omission, which the defendant claims is objectionable, and so no opportunity given to correct the alleged mistake.

I understand the rule of law to be well settled that the attention of the trial court must be called to the specific matter which is claimed to be objectionable, and so called that an opportunity is given to make a correction. *Non constat*, but that if the attention of the court is thus called to the particular matter it will correct, and thus remedy any supposed error. Now, as stated, this whole page is objected to, and no grounds of objection given — no particular matter pointed out as erroneous. And yet there can be no doubt that much of what is said, and some, at least, of the propositions found in this portion of the charge, are unobjectionable. What is there wrong, for instance, in these declarations of law:

"We go to the first proposition where the crime of murder has been committed, which asserts that he who with his own hand did the act which produced the result is guilty. The second proposition is that if at the time that Andrew J. Colvard was shot by Stand Rowe the defendant was present at that time and at the place of the shooting, that, of course, would not alone make him guilty — the mere fact that he was present." "Yet it is an element that we are to take into consideration to see whether his connection with the act of killing was such that he is guilty of the crime, because he could not be guilty unless present actually or constructively." "Then we are to see whether he was present at the place of the killing. That does not mean that he had to be right at the man who was shot — right by the side of Stand Rowe — but that he was so near to that place as that he could in some way contribute to the result that was produced by some act done by him or some words spoken by him."

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Dissenting Opinion: Brewer, Brown, JJ.

The decision of this court is that in the latter part of the charge on this page there was an omission of certain matter which was necessary to make the statement of the law full and accurate. What is the omission? Simply this, that when the court spoke of aiding or abetting "by word or by advising or encouraging," it did not add that "the acts or words of encouragement and abetting must have been used by the accused with the intention of encouraging and abetting." Can a party "advise" another to kill without intending to encourage the killing? Does not the word "abet" imply an intent that the party shall do that which he is abetted to do? Bouvier (vol. 1, p. 39) says: "To abet another to commit a murder is to command, procure, or counsel him to commit it." We are not dealing with the mock scenes and shows of the stage, but with real life, and in that who does not understand that the significance of the word "abet" is as Bouvier defines it, and carries with it the intent that the party shall do that which he is commanded, counselled, or encouraged to do? But whatever of technical criticism may be placed upon this language, can there be any doubt that twelve ordinary men, sitting as jurors, would understand that there was implied the intent on the part of the defendant to bring about the homicide by the use of the words? If the counsel for defendant thought there was any possibility of the jury being misled, or that any juror would understand the court as meaning to tell them that a party who, with no thought of murder, makes some casual remark, upon the hearing of which a third person is prompted to shoot and kill, was also guilty of murder from the mere fact of this accidental remark, all that would have been necessary would have been to call the attention of the court to the matter, and to avoid the possibility of misunderstanding a correction would unquestionably have been made. It seems to me that great injustice is being done to the government and wrong to the public when verdicts of guilty are set aside by reason of an omission from the charge, which probably did not mislead the jury, which would unquestionably have been corrected if called to the attention of the court, which was not specially excepted to, which affects but

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one proposition among many, all of which were challenged by only a single exception running to them as an entirety, which was not noticed in the motion for a new trial or in the assignment of errors, and is evidently an afterthought of counsel, with the record before them studying up some ground for a reversal.

With regard to the second error, said by the court to exist in this page of the charge, it is found, as clearly appears from the opinion, only in the last sentence, and as an independent proposition. No separate exception was filed to that proposition. Could anything more clearly emphasize the fact that by this opinion the court is reversing the rule heretofore laid down as law in the quotations presently to be made, than thus picking out a single sentence containing an independent proposition, not especially excepted to, and declaring that a general exception to an entire page brings this error up for review. And that, too, when it is conceded that the objectionable words stated a proposition of law correctly applicable to some cases, though, as claimed, not to the facts of this. And here it is well to note the language of rule 4 of this court: "The judges of the Circuit and District Courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and those matters of law, and those only, shall be inserted in the bill of exceptions, and allowed by the court."

What matter of law was distinctly stated in the bill of exceptions? I understand the court to concede that the rule is substantially as I have claimed, but hold that it is inapplicable here, and that in order to present a just view of the error complained of, it was necessary, or at least useful, to cite the entire passage of the charge that covered it. The law is good, but it ought not to be enforced. When, as here, the entire charge is preserved in the record it is not necessary to extend an exception to a whole page in order to see the bearing of the particular matter of alleged error. Even if the entire

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charge was not preserved, and we had only this page before us, and the consideration of the entire charge was necessary to disclose the bearing of the particular sentence or proposition claimed to be erroneous — conceding all this, it does not obviate the difficulty that the specific error now complained of was not called to the attention of the trial court. And, after all, the rule is as shown in the quotations following, that an objection must be made in such a way that the trial court knows what it is that is objected to, and has an opportunity to make a correction. Nothing of that kind is possible when a party excepts to a whole page of the charge, and in the appellate court, for the first time, calls attention to the specific matter in a portion of that page which is said to be objectionable.

The suggestion that, because the learned judge below was satisfied with the shape in which the exceptions were presented to him, this court must consider them as sufficient for any matter which the ingenuity of counsel may, since the trial, have discovered, has certainly the merit of novelty. No one can say, from this record, that the questions which have been argued and upon which the reversal is ordered were ever suggested to the trial court at the time the instructions were given, or on the motion for a new trial, and they are not named in the assignments of error. And yet, because the trial judge did not direct that the exceptions be prepared in some other way, this court holds that they are sufficient to bring all the matters involved in this page of the charge before this court.

In the case of *Carver* v. *Jackson*, 4 Pet. 1, 81, the entire charge was placed in the record, with a general exception to each and every part thereof. This practice was strongly condemned, and in the opinion Mr. Justice Story uses this language, quoted approvingly by Chief Justice Marshall in *Ex parte Crane*, 5 Pet. 190, 198:

"If, indeed, in the summing up, the court should mistake the law, that would justly furnish a ground for an exception. But the exception should be strictly confined to that misstatement, and, by being made known at the moment, would often enable the court to correct an erroneous expression, or to

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explain or qualify it in such a manner as to make it wholly unexceptionable, or perfectly distinct."

In the case of the *First Unitarian Society* v. *Faulkner*, 91 U. S. 415, 423, this court said:

"Two or three passages of the charge, it must be admitted, are quite indefinite, and somewhat obscure; but they are not more so than the exceptions of the defendants, which are addressed to nearly a page of the remarks of the judge, without any attempt to specify any particular paragraph or passage as the subject of complaint; nor does the assignment of errors have much tendency to remove the ambiguity.

"Instructions given by the court to the jury are entitled to a reasonable interpretation; and they are not, as a general rule, to be regarded as the subject of error on account of omissions not pointed out by the excepting party."

In *Railroad Company* v. *Varnell*, 98 U. S. 479, 482, a similar matter was presented to the court and disposed of in these words:

"Three exceptions are embraced in the first assignment of error, and the complaint is that the court erred in failing to give the defendants the full benefit of their evidence as to the contributory negligence of the plaintiff.

"Turning to the record, it appears that the first exception to the charge of the court is addressed to nearly a page of the remarks of the presiding justice, with nothing to aid the inquirer in determining what the complaint is, beyond what may be derived from the exception, which is in the following words: 'To which instruction the counsel for the defendants then and there excepted.'

"Much less difficulty would arise if the assignment of error contained any designation of the precise matter of complaint; but nothing of the kind can be obtained from that source. Certain portions of those remarks appear to be unobjectionable; as, for example, the judge told the jury that they must first determine whether the plaintiff was a passenger on the railroad of the defendants, and he called their attention to the testimony of the conductor, that the plaintiff was not in the car in which it seems he claimed that he had been riding just before he received the injury."

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In *Mobile & Montgomery Railway* v. *Jurey*, 111 U. S. 584, 596, the rule is thus stated:

"Conceding that the charge in respect to the rate of interest was erroneous, the judgment should not be reversed on account of the error. The charge contained at least two propositions, first, that the measure of damages was the value of the cotton in New Orleans, with interest from the time when the cotton should have been delivered; second, that the rate of interest should be eight per cent. It is not disputed that the first proposition was correct. But the exception to the charge was general. It was, therefore, ineffectual. It should have pointed out to the court the precise part of the charge that was objected to. 'The rule is, that the matter of exception shall be so brought to the attention of the court, before the retirement of the jury to make up their verdict, as to enable the judge to correct any error if there be any in his instructions to them.'"

See also *Bogk* v. *Gassert*, 149 U. S. 17, 26.

And this, I understand, is the rule in all appellate courts. I think it should be strictly adhered to, and that this court should not notice an exception which runs to a page of the court's charge, which points out no sentence or clause which is objected to, and specifies no ground of objection.

Again, in that portion of the charge calling attention to the weight to be given to the testimony of the defendant, I think the court committed no error. The statute makes the defendant a competent witness. It affirms nothing as to his credibility. I understand the rule to be that a court is always at liberty to refer to any matters, interest, impeachment, contradiction, feeling, or otherwise, that bear upon the question of the credibility of any witness. When the defendant becomes a witness he subjects himself to the same liability to criticism. Stress is laid upon these words "*the* other witnesses who are telling the truth," and it is said that there is an assumption that the witnesses who contradict the defendant are telling the truth. If the first "the" had been omitted, and the language been "other witnesses," etc., no such implication would arise. Is not this a refinement of criticism which offends com-

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mon sense? Does any one suppose that the jury understood the court to instruct them that the witnesses for the government were telling the truth, and that the defendant was lying when he testified differently? Is it not clear that they would understand simply that their attention was called to the effect on his credibility of a contradiction between his testimony and that of disinterested witnesses? Has it come to this that the use of the "definite article" in a charge is sufficient to set aside a verdict and overthrow a trial? It is indisputable that where the government calls an accomplice, it is the right, if not the duty, of the court to call the attention of the jury to his relationship to the case, and the bearing which such relationship has upon his credibility. If it may and ought to do that to protect the defendant against the danger of perjury on the part of witnesses of the government, may it not, and ought it not to, do the same to protect the government against the, at least equal, danger of perjury on the defendant's part? It is the duty of the trial court to hold the scales even between the government and the defendant, and, generally speaking, what it may and ought to do on the one side it may and ought to do on the other. For these reasons I dissent.

I am authorized to say that MR. JUSTICE BROWN concurs with me in this dissent.

COLUMBIA MILL COMPANY *v.* ALCORN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 115. Submitted November 24, 1893. — Decided December 4, 1893.

A person cannot acquire a right to the exclusive use of the word "Columbia" as a trade-mark.

To acquire a right to the exclusive use of a name, device, or symbol as a trade-mark, it must appear that it was adopted for the purpose of identifying the origin or ownership of the article to which it is attached, or

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that such trade-mark points distinctively to the origin, manufacture, or ownership of the article on which it is stamped, and is designed to indicate the owner or producer of the commodity, and to distinguish it from like articles manufactured by others.

If a device, mark, or symbol is adopted or placed upon an article for the purpose of identifying its class, grade, style, or quality, or for any purpose other than a reference to or indication of its ownership, it cannot be sustained as a valid trade-mark.

The exclusive right to the use of a mark or device claimed as a trade-mark is founded on priority of appropriation, and it must appear that the claimant of it was the first to use or employ it on like articles of production.

A trade-mark cannot consist of words in common use as designating locality, section, or region of country.

In the case of an alleged violation of a valid trade-mark, the similarity of brands must be such as to mislead ordinary observers, in order to justify a restraining injunction.

In equity to restrain an alleged violation of a trade-mark. Decree dismissing the bill, from which complainant appealed. The case is stated in the opinion.

Mr. P. H. Gunckel, for appellant, submitted on his brief.

No appearance for appellee.

Mr. Justice Jackson delivered the opinion of the court.

The complainant, a corporation of Minnesota, engaged in the manufacture of flour at Minneapolis in that State, brought this bill to restrain the defendants from using the word "Columbia" in a brand placed on flour sold by them. The complainant alleged that it had selected this word as a fanciful and arbitrary name or trade-mark at least five years prior to the filing of the bill, for the use and purpose of identifying a certain quality of flour of its own manufacture. The complainant's brand, printed on sacks and stencilled on the heads of barrels, was in the form of a circle, in the upper arc of which were the words "Columbia Mill Co.," and in the lower arc, "Minneapolis, Minn." These words were printed in blue. On a horizontal line, and in the middle of the circle, was the

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alleged trade-mark, "Columbia," in large letters, which was printed in red. Below this word, on separate lines and in smaller letters, were the words "Roller Process" and "Patent." The bill also alleged that the brand of flour on which the trade-mark was affixed obtained an extensive sale, and became generally known throughout the country, but that in the years 1887 and 1888 purchasers and consumers thereof were misled and deceived by the defendants, who put up in similar packages an imitation of the flour manufactured by the complainant, which was thus sold by them under the name, brand, and trade-mark "Columbia." It was further alleged that the flour thus sold, although inferior in quality to the complainant's article, caused a great diminution in the business of the complainant. The bill prayed for an injunction and an accounting of the profits on all the flour sold by the defendants under the brand of "Columbia."

The defendants answered that they carried on in Philadelphia a general business of buying outright, and of selling on commission, flour consigned to them, and that in accordance with the custom of the trade they had their own brands put on the sacks and barrels of flour handled by them. They admit that one of the brands so used was in the form of a circle, having the words "High Grade" in the upper arc, and under those words "No. 1;" then on the next line "Hard Wheat," under which, in large letters, was the word "Columbia," and below that, in letters of the same size, was the word "Patent," and the figures "196" in another line below. On the lower arc of the circle were the words "Minneapolis, Minn." The answer stated that the whole of the brand was printed in black ink. The defendants further averred that "they have never sold any flour not manufactured by the complainant as being the flour of the complainant. That they have not knowingly or actually used, or caused to be used, any brand for flour in imitation of any brand used by the complainant, nor have they ever sold any flour branded in imitation of complainant's flour. That they have never come in competition with complainant's flour, nor has any one ever purchased the respondents' flour believing it to be of the

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complainant's manufacture. That they deny any claim on the part of the complainant to any right to the name 'Columbia' as a trade-mark, averring that the same was used by these respondents and other parties long before the said complainant commenced to use it, and that other mills beside the complainant's manufacture and sell flour branded 'Columbia.'"

Upon the pleadings and proofs, the court below held that the complainant had not established its exclusive right to the use of the word "Columbia," in a brand for flour, and dismissed the bill. From this decree the present appeal is prosecuted.

We are clearly of opinion that there is no error in the judgment of the court below. The general principles of law applicable to trade-marks, and the conditions under which a party may establish an exclusive right to the use of a name or symbol, are well settled by the decisions of this court in the following cases: *Canal Co.* v. *Clark*, 13 Wall. 311; *McLean* v. *Fleming*, 96 U. S. 245; *Manufacturing Co.* v. *Trainer*, 101 U. S. 51; *Goodyear Co.* v. *Goodyear Rubber Co.*, 128 U. S. 598; *Corbin* v. *Gould*, 133 U. S. 308; *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 138 U. S. 537; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540.

These cases establish the following general propositions: (1) That to acquire the right to the exclusive use of a name, device, or symbol, as a trade-mark, it must appear that it was adopted for the purpose of identifying the origin or ownership of the article to which it is attached, or that such trade-mark must point distinctively, either by itself or by association, to the origin, manufacture, or ownership of the article on which it is stamped. It must be designed, as its primary object and purpose, to indicate the owner or producer of the commodity, and to distinguish it from like articles manufactured by others. (2) That if the device, mark, or symbol was adopted or placed upon the article for the purpose of identifying its class, grade, style, or quality, or for any purpose other than a reference to or indication of its ownership, it cannot be sustained as a valid trade-mark. (3) That the exclusive right to the use of the mark or device claimed as a trade-mark is

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founded on priority of appropriation; that is to say, the claimant of the trade-mark must have been the first to use or employ the same on like articles of production. (4) Such trade-mark cannot consist of words in common use as designating locality, section, or region of country.

The alleged trade-mark cannot, for many reasons, be made the subject of an exclusive private property. First, because it is clearly shown from the proof in the cause that the word "Columbia," as a brand upon sacks or barrels of flour, was in use long before its appropriation by the complainant.

It is established by the evidence that as early as 1865 or 1866 a brand was made for Lee & Hollingsworth, owners of the Columbia Mills of Brooklyn, New York, which was placed upon their sacks or barrels of flour, in the form of a circle. The upper part of the circle was formed of the words "Columbia Mills." In the middle of the circle, in large letters, was the word "Columbia," and above and below this word were placed, respectively, "196" and "XXX." In the lower arc of the circle were the words "Family Flour." The whole brand was printed in black, and was encompassed by a black circular border.

It is further shown by the proof that the word "Columbia," before its adoption by the complainant, was used by the Columbia Mill Company of Columbia, Brown County, Dakota; by the Columbia Elevator and Grain Mills of Providence, Rhode Island; by the Columbia Mill Company of Oakland, Indiana; and by S. S. Sprague & Company of Providence, Rhode Island. The word "Columbia" having been thus previously appropriated and used upon barrels and sacks of flour, was not subject to exclusive appropriation thereafter by the complainant, so as to make it a valid trade-mark such as the law will recognize and protect.

Second. The word "Columbia" is not the subject of exclusive appropriation under the general rule that the word or words, in common use as designating locality, or section of a country, cannot be appropriated by any one as his exclusive trade-mark.

In *Canal Co.* v. *Clark*, 13 Wall. 311, 321, it was held that the

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word Lackawanna, which is the name of a region of country in Pennsylvania, could not be, in combination with the word coal, constituted a trade-mark, because every one who mined coal in the valley of Lackawanna had a right to represent his coal as Lackawanna coal. Speaking for the court, Mr. Justice Strong said: "The word 'Lackawanna' was not devised by the complainants. They found it a settled and known appellative of the district in which their coal deposits and those of others were situated. At the time they began to use it, it was a recognized description of a region, and of course of the earths and minerals in the region. . . . It must be then considered as sound doctrine that no one can apply the name of a district of country to a well-known article of commerce, and obtain thereby such an exclusive right to the application as to prevent others inhabiting the district, or dealing in similar articles coming from the district, from truthfully using the same designation."

In *Koehler* v. *Sanders*, 122 N. Y. 65, it was held that the word "international" could not be exclusively appropriated by any one as a part of a trade name, because the word was a generic term in common use, and in its nature descriptive of a business to which it pertains, rather than to the origin or proprietorship of the article to which it might be attached.

In *Connell* v. *Reed*, 128 Mass. 477, it was held that the words "East Indian," in connection with "Remedy," placed upon bottles of medicine, were not the subject of a trade-mark. In that case Mr. Chief Justice Gray, speaking for the court, said: "that it was at least doubtful whether words in common use as designating a vast region of country and its products can be appropriated by any one as his exclusive trade-mark, separately from his own, or some other name, in which he has a peculiar right."

In *Glendon Iron Co.* v. *Uhler*, 75 Penn. St. 467, a corporation adopted the trade-mark "Glendon," which was placed upon their iron. The place where their furnace was located was afterwards erected into a borough by the name of Glendon. Another company, engaged in business in the same place, afterwards used the word "Glendon" on their iron. It

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was held that the second company had a right so to do. The ruling of the court was rested on the ground that the name "Glendon" was common to the whole world, and that the previous appropriation of it by the complainant did not prevent any other manufacturer of pig iron, in its limits, from using the same word.

In *Laughman's Appeal*, 128 Penn. St. 1, it was held that the word "Sonman," being the name of a large boundary of land, containing a number of separate private estates, owned by a number of different persons engaged in the business of mining and shipping coal, could not be adopted as a trade name by one party to the exclusion of others.

In the leading case of *Amoskeag Mfg. Co.* v. *Spear*, 2 Sandf. 599, it is laid down that no one has a right to appropriate a sign or symbol which, from the nature of the fact it is used to signify, others may employ with equal truth, and, therefore, have an equal right to employ for the same purpose.

It is upon these principles that a person may put his own name upon his own goods, notwithstanding another person of the same name may, in that name, manufacture and sell the same or similar articles. *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540.

The appellant was no more entitled to the exclusive use of the word "Columbia" as a trade-mark than he would have been to the use of the word "America," or "United States," or "Minnesota," or "Minneapolis." These merely geographical names cannot be appropriated and made the subject of an exclusive property. They do not, in and of themselves, indicate anything in the nature of origin, manufacture, or ownership; and in the present case the word "Columbia" gives no information on the subject of origin, production, or ownership. The upper part of the brand or label of the trade-mark discloses the full name of the complainant as the manufacturer of the article, and is in no way supplemented or made clearer by the word "Columbia." It can no more be said that it was intended to designate origin or ownership than to denote the quality of the flour on which the brand was placed, and the proof tends strongly to show that the whole label was

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intended to indicate the quality, or class, or character of the flour, as being made of spring wheat instead of winter wheat.

It is further shown by the proof that for the particular grade of flour, on which the brand including the alleged trade-mark "Columbia" was used, the complainant had at least three other trade names, such as "Golden Rod," "Best," and "Superlative," which were used indiscriminately, and for different sections of the country, with the word "Columbia." The quality and process of manufacture were identically the same, and all made from spring wheat, whether one trade name or the other was used thereon.

It is also shown by the testimony in this case that the flour manufactured from spring wheat, such as that dealt in both by the complainant and the defendants, is never sold or bought simply on the brand, but usually, if not always, by actual sample, and the proof fails to establish that the brand of the appellees was calculated to mislead, or did actually deceive or mislead, any one into supposing that the flour of the complainant was being bought. So it cannot be said that the defendants were personating the complainant's business by using such a description or brand as to lead customers to suppose that they were trading with the appellant. Even in the case of a valid trade-mark, the similarity of brands must be such as to mislead the ordinary observer.

For the foregoing reasons we are clearly of opinion that there was no error in the court below in dismissing the bill, and the same is, accordingly,

Affirmed.

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CONNECTICUT MUTUAL LIFE INSURANCE COMPANY *v.* AKENS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

No. 100. Argued and submitted November 22, 23, 1893. — Decided December 4, 1893.

A policy of life insurance, payable in "thirty days after due notice and satisfactory evidence of death" and excepting this risk: "Suicide. — The self-destruction of the insured, in any form, except upon proof that the same is the direct result of disease or of accident occurring without the voluntary act of the insured," covers the case of the insured's death as the direct result of taking poison when his mind is so far deranged as to be unable to understand the moral character of his act, even if he does understand its physical consequences; and it is sufficient to prove this at the trial, without stating it in the preliminary proof of death.

THIS was an action of assumpsit, brought January 14, 1888, by the executor of Archibald O. Smith, both citizens of Pennsylvania, against a life insurance company, a corporation of Connecticut, upon a policy of insurance, dated January 14, 1887, on Smith's life in the sum of $10,000, payable in "thirty days after due notice and satisfactory evidence" of his death, and upon the express conditions that "the following risks are not assumed by this company under this contract," and that "in each and every of the foregoing cases this policy shall become and be null and void." One of those risks and cases was as follows:

"Suicide. — The self-destruction of the insured, in any form, except upon proof that the same is the direct result of disease or of accident occurring without the voluntary act of the insured."

The declaration, after setting out the policy, alleged that Smith died on February 23, 1887, having paid all the premiums and complied with all the requirements of the policy; and that on March 16, 1887, good and sufficient proof of his death was made to the defendant.

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Statement of the Case.

The defendant pleaded non-assumpsit, with an affidavit of defence that Smith's death was a self-destruction or suicide, the direct result of laudanum poison administered by him to himself for the purpose and with the effect of causing his death, and contrary to the provision of the policy.

The plaintiff filed a replication, denying these allegations, and alleging that, if Smith's death was a self-destruction, it was the direct result of disease or of accident occurring without his voluntary act, and without any purpose or intention of self-destruction or suicide, and his reasoning faculties at the time of taking the poison were so far impaired that he was not able to understand the moral character, or the nature, consequence, and effect of the act he was about to commit, and it was not contrary to the provisions of the policy.

At the trial, the plaintiff gave in evidence the policy, and formal proof of death, as alleged in the declaration, and rested his case. The defendant then introduced evidence tending to support the defence pleaded. The plaintiff then introduced evidence tending to show that Smith's reasoning faculties at the time he took the poison were so far impaired that he was not able to understand the moral character, and the nature, effect, and consequence of the act he was about to commit; but, other than this, offered no evidence tending to show that his death was the direct result of disease or of accident occurring without his voluntary act.

Upon this evidence, the defendant requested the court to instruct the jury as follows:

"First. If the jury believe from the evidence in the case that Smith, the insured, destroyed his own life, and that at the time of the self-destruction he had sufficient capacity to understand the nature of the act which he was about to commit and the consequences which would result from it, then and in that case the plaintiff cannot recover on the policy sued on in this case.

"Second. If the jury believe from the evidence that the self-destruction of the said Smith was intended by him, he having sufficient capacity at the time to understand the nature of the act which he was about to commit and the consequences

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which would result from it, then and in that case it is wholly immaterial in the present case that he was impelled thereto by insanity which impaired his sense of moral responsibility and rendered him to a certain extent irresponsible for his action.

"Third. If the jury believe from the evidence that Smith's life was ended February 23, 1887, by means of laudanum poison administered by himself to himself, the plaintiff cannot recover on the policy sued upon in this case, unless the jury believe also from the evidence that the self-destruction aforesaid of said Smith was the direct result of disease or of accident occurring without his voluntary action.

"Fourth. Under all the evidence in this case, the verdict of the jury should be for the defendant."

The court declined to give the first, second, and fourth instructions requested, and upon the third request instructed the jury as follows:

"The third point is affirmed, with this exception: that if the act of self-destruction was the result of insanity, and was with suicidal intent, and the mind of the insured was so far deranged as to have made him incapable of using a rational judgment in regard to the act he was about to commit, the defendant is liable; but if he was impelled to the act by an insane impulse, which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to commit, the defendant is liable. If from the evidence you believe that the insured, though excited or angry or depressed in mind from any cause, formed the determination to take his own life, because in the exercise of his usual reasoning faculties he preferred death to life, then the defendant is not liable."

To this qualification of the third instruction, as well as to the refusal to give each of the other instructions requested, the defendant excepted, and, after verdict and judgment for the plaintiff for the amount of the policy, sued out this writ of error.

Mr. George W. Guthrie for plaintiff in error.

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Argument for Plaintiff in Error.

The phrase "self-destruction in any form," used in the policy, is not merely the equivalent of suicide, but covers every case of self-killing, whether felonious or otherwise. If the death of the insured was brought about in the manner alleged, no recovery could be had, even though his mental condition was such as described by the court, unless it was the direct result of disease (the opium having been self-administered with the intention of destroying his life, it could not be accidental), and unless proof thereof was furnished to the company before suit brought, or at least produced at the trial of the case.

If by the expression "self-destruction in any form," the parties meant only suicide or felonious self-killing, then the words which follow have no significance or effect. A suicide could not be the result of disease or of accident occurring without the voluntary act of the insured. Therefore, no proof that it was such could be produced. Self-killing by an insane man, or by accident, is not suicide, and to interpret this provision so that it excludes suicide on proof that it is not suicide, is to make it without sense.

It follows, therefore, that the context in which the phrase is used clearly shows that by it the parties themselves intended something more than suicide only. It is also clear that the only other sense in which it could have been used was the generic one, meaning thereby any case of self-killing, whether felonious or otherwise. And therefore that it was used in that sense, and as the word is not a technical one and has never received a technical interpretation, the meaning which the parties themselves attached to it must prevail. *Bigelow* v. *Berkshire Life Ins. Co.*, 93 U. S. 284.

The word "self-destruction" is a generic word, and has never been held to have only a limited technical meaning, as the word "suicide" has. It belongs to the same class as the word "homicide," which includes every mode by which the life of one man is taken by the act of another, whether sane or insane, by intention or by accident, feloniously or innocently. (See the definition in Worcester, Webster, The Century, and the Encyclopædia.)

It is apparent, therefore, that when correctly used, the word

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"self-destruction" does not of itself import any element of intention or design: it simply designates the act of taking one's own life, without regard to whether it is felonious or non-felonious, intentional or otherwise.

It was used in this sense by this court in the cases of *Life Ins. Co.* v. *Terry*, 15 Wall. 580; *Bigelow* v. *Berkshire Life Ins. Co.*, 93 U. S. 284; *Ins. Co.* v. *Rodel*, 95 U. S. 232; *Manhattan Ins. Co.* v. *Broughton*, 109 U. S. 121; *Connecticut Ins. Co.* v. *Lathrop*, 111 U. S. 612.

In each one of these cases the word "suicide" and the phrase "died by his own hand," are defined as meaning felonious self-destruction, a definition which has no meaning if "suicide" and "self-destruction" are synonymous terms. It would amount to nothing more than a statement that "suicide" meant "felonious suicide."

On the other hand, if the word "self-destruction" is a generic term then the definition is correct. In common usage the word simply indicates that the man's life has been destroyed through his own instrumentality. To give color to the act some adjective qualifying phrase is necessary.

We therefore submit that, as the evidence showed that the insured died from poison administered by himself with the intention of taking his own life, the plaintiff cannot recover, even though the insured was insane at the time, except by showing that the insanity resulted from disease, and that the proof of it was given to the company.

The circumstances leading to the incorporation of these provisions in life insurance policies are too well known to require more than the merest reference. It having been held that an exception of suicide from the risks assumed would exclude only felonious self-destruction, the insurance companies sought some word or phrase which would have a wider meaning. Some, as the plaintiff in error, adopted the words "self-destruction in any form," while others retained the word "suicide," qualifying it, however, with various phrases, as "sane or insane," "felonious or otherwise," "voluntary or involuntary."

The effect of this was to exclude many risks which the

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companies were willing to assume upon proper conditions, as, for instance, they were willing to insure against self-destruction by accident, or while suffering from insanity the direct result of disease, provided they could be protected from imposition, and the well-known tendency of juries to find insanity in every case of self-destruction.

The clause now before the court was designed for this purpose. The company agrees to pay in a certain time after proof of death, self-destruction being excluded "except upon proof that it was the direct result of disease or of accident occurring without the voluntary act of the insured."

Nothing can be clearer than that it was the intention of the parties to exclude from the risks assumed some cases of self-destruction, and in all cases of self-destruction to impose upon the claimant the duty of furnishing proof that it was not one of the excluded cases; and, further, that the cases assumed are those in which the self-destruction was the direct result of disease or accident, and that all others were excluded.

Mr. D. B. Kurtz and *Mr. C. H. Akens* filed a brief for defendant in error; but the court declined to hear them.

Mr. Justice Gray, after stating the case, delivered the opinion of the court.

This case is governed by a uniform series of decisions of this court, establishing that if one whose life is insured intentionally kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, even if he does understand its physical nature, consequence, and effect, it is not a "suicide," or "self-destruction," or "dying by his own hand," within the meaning of those words in a clause excepting such risks out of the policy, and containing no further words expressly extending the exemption to such a case. *Life Ins. Co.* v. *Terry*, 15 Wall. 580; *Bigelow* v. *Berkshire Ins. Co.*, 93 U. S. 284; *Insurance Co.* v. *Rodel*, 95 U. S. 232; *Manhattan Ins. Co.* v. *Broughton*, 109 U. S 121; *Connecticut Ins. Co.* v. *Lathrop*, 111 U. S. 612; *Accident Ins. Co.* v. *Crandal*, 120 U. S. 527.

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In the case at bar, the first two instructions requested were exactly like those held to have been rightly refused, and the modified instruction given upon the third request was substantially like that held to have been rightly given, in *Terry's case*, in which the words of the exemption were "die by his own hand." That decision was followed and approved in *Rodel's case* and *Lathrop's case*, in each of which the words were the same; and in *Broughton's case*, in which the words were "die by suicide," and the court, treating the two phrases as equivalent, expressed the opinion that "the rule so established is sounder in principle, as well as simpler in application, than that which makes the effect of the act of self-destruction, upon the interests of those for whose benefit the policy was made, to depend upon the very subtle and difficult question how far any exercise of the will can be attributed to a man who is so unsound of mind that, while he foresees the physical consequences which will directly result from his act, he cannot understand its moral nature and character, or in any just sense be said to know what it is that he is doing." 109 U. S. 131.

In *Crandal's case*, it was accordingly held that a policy of insurance against "bodily injuries, effected through external, accidental, and violent means," and occasioning death or complete disability to do business, but excepting "death or disability caused wholly or in part by bodily infirmities or disease, or by suicide or self-inflicted injuries," covered death by hanging one's self while insane; the court saying, "If self-killing, 'suicide,' 'dying by his own hand,' cannot be predicated of an insane person, no more can 'self-inflicted injuries'; for in either case it is not his act." 120 U. S. 532.

In the policy in suit, the clause of exemption is in these words: "Suicide. — The self-destruction of the assured, in any form, except upon proof that the same is the direct result of disease or of accident occurring without the voluntary act of the assured."

It was argued that the word "self-destruction," as here used, was more comprehensive than "suicide," and included an intentional, though insane, killing of one's self. But the two words are treated as synonymous in the very clause in ques-

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tion, as well as in the former opinions of this court. The act, whether described by words of Saxon or of Latin origin, or partly of the one and partly of the other — "dying by his own hand," "self-killing," "self-slaughter," "suicide," "self-destruction" — without more, cannot be imputed to a man who, by reason of insanity, (as is commonly said,) "is not himself."

The added words "in any form" clearly relate only to the manner of killing; the word "disease," unrestricted by anything in the context, includes disease of the mind, as well as disease of the body; and the concluding words "the voluntary act of the assured" point to the act of a person mentally capable of controlling his will. The clause contains no such significant and decisive words as "die by suicide, sane or insane," as in *Bigelow* v. *Berkshire Ins. Co.*, 93 U. S. 284; or "by suicide, felonious or otherwise, sane or insane," as in *Travellers' Ins. Co.* v. *McConkey*, 127 U. S. 661.

Upon that part of the clause, which requires "proof that the same is the direct result of disease or of accident occurring without the voluntary act of the insured," it was argued that such proof must be furnished to the company as part of the preliminary proof of death; and also that evidence that the mental condition of the insured, at the time of the self-destruction, was of the character which the court below held to render him irresponsible for his act, was not sufficient proof that the self-destruction was the result of disease or accident. But the word "proof" here clearly means, not the proof required as a preliminary to bringing suit on the policy, but the proof necessary to establish the liability of the insurer. And in making out such proof, the plaintiff is entitled to the benefit of the presumption that a sane man would not commit suicide, and of other rules of law established for the guidance of courts and juries in the investigation and determination of facts. *Travellers' Ins. Co.* v. *McConkey*, 127 U. S. 661, 667.

Judgment affirmed.

MR. JUSTICE HARLAN and MR. JUSTICE SHIRAS did not sit in this case, or take any part in its decision.

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LEES *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 98. Argued November 22, 1893. — Decided December 4, 1893.

A district court of the United States has jurisdiction over an action to recover a penalty imposed for a violation of the act of February 26, 1885, 23 Stat. 332, c. 164, "to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia."

The act of February 26, 1885, 23 Stat. 332, c. 164, prohibiting the importation of aliens under contract to perform labor in the United States is constitutional.

An action to recover a penalty under that act, though in form a civil action, is unquestionably criminal in its nature, and the defendant cannot be compelled to be a witness against himself.

It is well settled that, instead of preparing separate bills for each separate matter, all the alleged errors of a trial may be joined in one bill of exceptions; and the exception in this case is specific and direct to the one error of compelling the defendant to become a witness against himself, and comes within this rule.

THIS was a civil action in form, to recover a penalty for importing an alien under contract to perform labor, in violation of the act of February 26, 1885, 23 Stat. 332, c. 164. The point upon which the case turns in the opinion is, that the action being criminal in nature, though civil in form, the defendant could not be compelled to be a witness against himself.

Mr. Hector T. Fenton for plaintiffs in error.

Mr. Assistant Attorney General Conrad for defendants in error.

It is assigned as error, that the court erred on the trial in overruling defendants' objection to the compulsory examination of John Lees. If error in this regard was committed by

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the trial court, it could be brought to the attention of the reviewing court only by a bill of exceptions, setting forth plainly the matter complained of as error, and thereby introducing the same into the record. *Hanna* v. *Maas*, 122 U. S. 24.

In this case a bill of exceptions appears to have been begun, and later on in the record to have been concluded. The intermediate space is occupied with the testimony of the witnesses, among which appears the following: "John S. Lees, sworn. Mr. Fenton: John S. Lees, the witness called, is one of the defendants. This is a proceeding in the nature of a criminal proceeding. I object to his being examined on behalf of the plaintiff, because he is protected by statute. (Objection overruled. Exception for defendant.)"

It nowhere appears, by any certificate of the judge, by whom John S. Lees was called to testify, or on whose behalf: nothing by which the fact is certified to this court that any objection was made and overruled, or any exception taken for defendants, nor, indeed, does it appear when, or by whom the remarks above quoted were written, upon the record from which this transcript was made. These are all matters extraneous to the record and could only be introduced into it by a proper bill of exceptions. No such bill appears in this record.

And now as to the charge and opinion of the court which is the subject of this bill of exceptions: No error is specifically assigned, but the whole charge is dumped out *en masse*, and this court is called upon to scrutinize the whole opinion and charge, and pick out from it such error as it may discover.

And thus, neither "the points of law," the charge of the court, nor the opinions of the court, are before this court for review.

Mr. Justice Brewer delivered the opinion of the court.

On August 22, 1888, the United States commenced this action in the District Court of the United States for the Eastern District of Pennsylvania to recover of Joseph Lees and John S. Lees, the present plaintiffs in error, the sum of one

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thousand dollars, as a forfeit and penalty for a violation by them of the act of Congress of February 26, 1885, entitled "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia." 23 Stat. 332, c. 164. Proceedings were thereafter had in that suit which resulted in a judgment, on February 23, 1889, in favor of the United States, for the sum of one thousand dollars. This judgment was affirmed by the Circuit Court of that district, and has since, by writ of error, been brought to this court for review.

The first alleged error is that the District Court had no jurisdiction over the action. The third section of the act provides that, for every violation, the offender "shall forfeit and pay for every such offence the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor, including any such alien or foreigner, who may be a party to any such contract or agreement, as debts of like amount are now recovered in the Circuit Courts of the United States." It is insisted that the last clause of this sentence vests the sole jurisdiction over such actions in the Circuit Court. But for those words there would be no question of the jurisdiction of the District Court.

From the earliest history of the government the jurisdiction over actions to recover penalties and forfeitures has been placed in the District Court. The ninth section of the Judiciary Act of September 24, 1789, 1 Stat. 73, 76, c. 20, provided as follows: "The District Court shall have exclusive original cognizance . . . of all suits for penalties and forfeitures incurred under the laws of the United States." While in the Revised Statutes the word "exclusive" was omitted, the language was not otherwise substantially changed. It is true that in some cases jurisdiction over matters of penalty and forfeiture has been committed to the Circuit Court, but this was always done by special act, and does not otherwise affect the proposition that the general jurisdiction over actions for penalties and forfeitures has been and is vested in the District

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Court. Hence, when, as here, a statute imposes a penalty and forfeiture, jurisdiction of an action therefor would vest in the District Court, unless it is in express terms placed exclusively elsewhere. If the words, "as debts of like amount are now recovered," were omitted from this last clause, the construction claimed by counsel might be sustained; jurisdiction would then be given to the Circuit Courts. So, if those words were in parenthesis, or even separated from the last part of the clause by a comma, or any similar punctuation, there would be plausibility in the contention; but taking the clause as a whole, giving force to all its words, it would seem to refer to the form of the action rather than to the forum. When it is remembered that a penalty may be recovered by indictment or information in a criminal action, or by a civil action in the form of an action of debt, and also that the Circuit Courts of the United States are, as contradistinguished from the District Courts, the Federal courts of original civil jurisdiction, the significance of this clause is clear. It in effect provides that, although the recovery of a penalty is a proceeding criminal in its nature, yet in this class of cases it may be enforced in a civil action, and in the same manner that debts are recovered in the ordinary civil courts. Repeals by implication are not favored, and the general grant of jurisdiction to the District Courts of suits to recover penalties and forfeitures should not in any case be transferred exclusively to the Circuit Courts by words of doubtful import. In *United States* v. *Mooney*, 116 U. S. 104, a somewhat similar effort was made to construe certain provisions of a statute as divesting the District Courts of their general jurisdiction over suits to recover penalties and forfeitures; but, in the face of language more significant of a change than that here presented, this court sustained such jurisdiction.

A second alleged error is that the act, so far as it imposes this penalty, is unconstitutional. This question was elaborately considered by Mr. Justice Brown, then a Judge of the District Court, in *United States* v. *Craig*, 28 Fed. Rep. 795, and the conclusion reached that there was nothing in the act conflicting with the Constitution. In *Church of the Holy Trinity* v.

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United States, 143 U. S. 457, its constitutionality was assumed; and since the *Chinese Exclusion Case*, 130 U. S. 581, and the case of *Fong Yue Ting* v. *United States*, 149 U. S. 698, affirming fully the power of Congress over the exclusion of aliens, there can be little doubt in the matter. Given in Congress the absolute power to exclude aliens, it may exclude some and admit others, and the reasons for its discrimination are not open to challenge in the courts. Given the power to exclude, it has a right to make that exclusion effective by punishing those who assist in introducing, or attempting to introduce, aliens in violation of its prohibition. The importation of alien laborers, who are under previous contract to perform labor in the United States, is the act denounced, and the penalty is visited not upon the alien laborer — although by the amendment of February 23, 1887, 24 Stat. 414, c. 220, he is to be returned to the country from which he came — but upon the party assisting in the importation. If Congress has power to exclude such laborers, as by the cases cited it unquestionably has, it has the power to punish any who assist in their introduction.

A third allegation of error is that the court compelled one of the defendants to become a witness for the government, and furnish evidence against himself. The bill of exceptions reads as follows:

"John S. Lees sworn.

"Mr. Fenton: John S. Lees, the witness called, is one of the defendants. This is a proceeding in the nature of a criminal proceeding. I object to his being examined on behalf of the plaintiff, because he is protected by statute.

"(Objection overruled. Exception for defendant.)"

This, though an action civil in form, is unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself. It is unnecessary to do more than to refer to the case of *Boyd* v. *United States*, 116 U. S. 616. The question was fully and elaborately considered by Mr. Justice Bradley in the opinion delivered in that

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case. And within the rule there laid down it was error to compel this defendant to give testimony in behalf of the government.

Not questioning that such is the scope and effect of the decision in *Boyd* v. *United States*, counsel for the government insists that the objection is not properly preserved in the record, and, therefore, not open for our consideration. A single bill of exceptions was prepared to bring on to the record all the proceedings of the trial. It gives all the testimony, the various objections and rulings during its admission, the instructions asked, the charge of the court, and the exceptions thereto, and closes with these words:

"And thereupon the counsel for the said defendants did then and there except to the aforesaid charge and opinion of the said court, and inasmuch as the said charge and opinion, so excepted to, do not appear upon the record:

"The said counsel for the said defendants did then and there tender this bill of exceptions to the opinion of the said court, and requested the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judge, at the request of the said counsel for the defendants, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 14th day of May, 1889.

"(Signed) WILLIAM BUTLER. [Seal.]"

The objection is that it nowhere appears, by any direct certificate of the judge, by whom John S. Lees was called to testify, or on whose behalf, or that any objection was made and overruled, or any exception taken. Counsel says in his brief: "It is plainly evident that the bill of exceptions was designed, as it states, to introduce into this record only the charge and opinion of the court, and did not relate to any of the innumerable other matters, as to which it appears that the right to except was reserved at the time of their occurrence, and memoranda entries made at the time for future bills of excep-

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tion, should they hereafter be deemed advisable. But the purpose to introduce these matters by such bills of exception seems to have been abandoned; at any rate, no such bills appear in this record, and these matters cannot, therefore, be considered by the court."

There is some plausibility in this contention, inasmuch as the two sentences prior to the last, quoted above from the bill of exceptions, suggest, at least, that the purpose of counsel for defendants was simply to preserve exceptions to the charge, and that the authentication of the judge was requested for that alone. But whatever of force there is in this implication is overborne by the statement in the last sentence of what the judge did. By his signature and seal he authenticated the bill of exceptions, as prepared and presented to him. And all the facts and matters stated in that bill are by such authentication brought into the record for all purposes for which they may legitimately be used.

The bill is a single bill of exceptions, commencing with the opening of the trial and ending with the charge of the court, and as such it is authenticated. And that, by this bill errors other than those in the charge were sought to be preserved, is made clear by the fact that, in the assignments of error filed with the bill, there are separate allegations of error in respect to the rulings of the court in the admission of testimony. It is well settled that, instead of preparing separate bills for each separate matter, all the alleged errors of a trial may be incorporated into one bill of exceptions. *Pomeroy's Lessee* v. *Bank of Indiana*, 1 Wall. 592, 600, 601, in which it was said: "Many exceptions may be inserted in one bill of exceptions, and, of course, it is sufficient if the bill of exceptions is sealed at the close. Accordingly, the practice, in the first and second circuits, is to put every exception taken at the trial into one bill of exceptions, which makes the records less voluminous." See also *Chateaugay Iron Co., Petitioner*, 128 U. S. 544. It does not, however, follow that, because all rulings excepted to at the trial may be incorporated into one bill of exceptions, all the proceedings at the trial ought to be stated at length. On the contrary, we frequently find all the testimony set out in

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such a bill when it can serve no useful purpose, and simply encumbers the record. Only so much of the testimony, or the proceedings, as is necessary to present clearly the matters at law excepted to should be preserved in a bill of exceptions. If counsel would pay more attention to this, they would often save this court much unnecessary labor, and their clients much needless expense. Of course, in this case, as in all similar cases, there remains an inquiry as to the scope and sufficiency of any particular objection or exception disclosed by the bill. All that is meant by this ruling is that the objection or exception thus noted is before us for consideration for whatever it is worth. And, turning to the exception now under consideration, it is specific and direct to the one error of compelling the defendant to be a witness against himself. It is not like that in *Railroad Company* v. *Varnell*, 98 U. S. 479, where the exception ran to a whole page of the court's charge, nor was it as in *Hanna* v. *Maas*, 122 U. S. 24, an objection without any exception to the court's ruling, but a distinct objection to a specific matter presented, considered, and overruled, and the ruling excepted to. It was, therefore, sufficient to bring to the consideration of this court the error alleged.

The judgment is reversed, and the case remanded for a new trial.

MR. JUSTICE HARLAN did not hear the argument, nor take part in the decision of this case.

KINKEAD v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 83. Argued November 15, 1893. — Decided December 4, 1893.

The court of claims was not estopped by the recitals in the act of January 17, 1887, 24 Stat. 358, c. 21, referring this case to it, from considering the question of the title of the claimants to the property whose value is sought to be recovered.

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Statement of the Case.

The commissioners appointed by the governments of the United States and of Russia for the transfer of Alaska under the treaty of March 30, 1867, 15 Stat. 539, had no power to vary the language of the treaty or to determine questions of title or ownership.

The building constructed by the Russian-American Company in 1845 on land belonging to Russia became thereby, so far as disclosed by the facts in this case, the property of the Russian government, and, being transferred to the United States by the treaty of March 30, 1867, no property or ownership in it remained in the Russian-American Company, which it could transfer to a private person adversely to the United States.

THIS was a petition by John H. Kinkead and Samuel Sussman, claiming to be the owners and lawfully possessed of a certain warehouse in Sitka, Alaska, for the rent of a part of such warehouse at the rate of $200 per month, from December 15, 1868, to December 15, 1888, the date of the petition, amounting to $48,000; and also the further sum of $69,300 for rent of another part of the same building from September 12, 1869, to December 15, 1888; together with the further sum of $50,000 for the value of the building; the aggregate amount of the claim being $167,300.

Petitioners claimed to have purchased the building from the Russian-American Company, through Prince Maksoutoff, chief factor, for the sum of $3000 in gold.

A former petition for the same claim had been presented to the Court of Claims and dismissed by it for want of jurisdiction, upon the ground that, as the title set up by the claimants depended upon the construction of the treaty between the United States and the Emperor of Russia, the court was without jurisdiction over the same. 18 C. Cl. 504. Whereupon claimants procured the passage of an act of Congress approved January 17, 1887, referring their claim to the Court of Claims for adjudication.

The petition under consideration having been heard, the court made a finding of facts, the substance of which appears in the opinion of this court, and entered a judgment dismissing the petition upon the ground that Kinkead and Sussman had no title to the property in question. From this judgment petitioners appealed to this court.

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Mr. George A. King and *Mr. Joseph K. McCammon*, (with whom was *Mr. John Mullan* on the brief,) for appellants.

Mr. Assistant Attorney General Dodge for appellees.

Mr. Justice Brown, after stating the case as above, delivered the opinion of the court.

Petitioners' title to the building in question, which they claim to have bought of the Russian-American Company, a Russian corporation, soon after the cession of Alaska to the United States, depends upon the construction to be given to the treaty of March 30, 1867, between His Majesty the Emperor of Russia and the United States, 15 Stat. 539, the correspondence and protocol connected therewith, and the act of Congress of January 17, 1887, referring this claim to the Court of Claims for adjudication. Upon the hearing in the Court of Claims, the court found "that at the time Alaska was ceded by Russia to the United States there was standing on a certain lot adjacent to the public wharf in the town of Sitka a building, constructed of hewn logs, 118 feet in length and 50 feet in width. The land upon which this building stood belonged to Russia, and was thus embraced in the cession to the United States."

This building was erected in 1845 by the Russian-American Company, at their own expense, and from that time to the date of the treaty had been used by said company as a warehouse for the storage of furs and other property, and for trading purposes.

By what authority from Russia this land was built upon and occupied by said company, further than is shown in finding II, (which relates solely to proceedings taken for the transfer of the ceded territory,) "does not appear."

By the first article of the treaty the Emperor makes cession of "all the territory and dominion now possessed by his said Majesty on the continent of America, and in the adjacent islands, the same being contained in the geographical limits herein set forth, to wit:" (Boundaries.)

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The second article provided that "in the cession of the territory and dominion made by the preceding articles are included the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property."

Article four provides for the appointment of an agent for each government for the purpose of making and receiving formal delivery of the ceded territory, and "for doing any other act which may be necessary in regard thereto." "But the cession, with right of immediate possession, is nevertheless to be deemed complete and absolute on the exchange of ratifications, without waiting for such formal delivery."

Article six provides that "the cession of territory and dominion herein made is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, except merely private individual property holders."

It should be added in this connection, and as explanatory of the sixth article of the treaty, that on March 23, 1867, Mr. Seward, then Secretary of State of the United States, addressed a letter to the Russian minister in which he stated: "I must insist upon that clause in the sixth article of the draft which declares the cession to be free and unencumbered by any reservations, privileges, franchises, grants, or possession by any associated companies, whether corporate or incorporate, Russian or any other, etc., and must regard it as an ultimatum. With the President's approval, however, I will add two hundred thousand dollars to the consideration money on that account." To this letter the Russian minister made reply that he believed himself "authorized to accede literally to this request on the conditions indicated" in the note of the Secretary.

In pursuance of the fourth article of the treaty, the President appointed General Rousseau commissioner to receive the formal transfer of the ceded territory, with instructions to "enter into communication with Captain Pestchouroff, the Russian commissioner, now here, and arrange with him with

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regard to proceeding as soon as may be convenient to the territory, etc. . . . Pursuant to the stipulations of the treaty that transfer will include all forts and military posts and public buildings, such as the governor's house and those used for government purposes, dock-yards, barracks, hospitals, and schools, all public lands, and all ungranted lots of ground at Sitka and Kodiak. Private dwellings and warehouses, blacksmiths', joiners', coopers', tanners', and other similar shops, icehouses, flour and saw-mills, and any small barracks on the island are subject to the control of their owners, and are not to be included in the transfer to the United States."

The commissioners were further instructed to draw up and sign full inventories, distinguishing between the property to be transferred to the United States and that to be retained by individuals; and were also instructed to furnish the proprietors of individual property with a certificate of their right to hold the same upon production of documentary or other proof of ownership.

"As it is understood that the Russian-American Company possess in that quarter large stores of furs, provisions, and other goods now at Sitka, Kodiak, and elsewhere on the main land and on the island, it is proper that that company should have a reasonable time to collect, sell, or export that property. For that purpose the company may leave in the territory an agent or agents for the purpose of closing their business."

In his report of his proceedings, General Rousseau stated: "I found that by the charter of the Russian-American Company it had authority to vest in its employés, occupants of land in the territory, the title thereto. This was on condition, however, that the possessions of the Indians should not be interfered with.

"Acting under this charter, the company from the first caused dwellings to be erected for the use of its employés on lots of ground set apart for the purpose. The title in fee to such premises was often vested in the employé in possession when he had faithfully served out his term in the company, or, having died before it ended, and having a widow or

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children in the territory, the title was frequently vested in them.

"Finding in its charter this authority of the company to vest title to land in its employés, and that very many of the dwellings erected by the company were occupied by employés or their widows and children, who claimed the property in fee, the commissioners called on the governor, Prince Maksoutoff, to define and certify to the interest of each individual thus occupying such dwellings and lots, in order that we might distinguish between those who owned the property in fee and those who claimed a less interest, and in compliance with your instructions give certificates to the claimants accordingly.

"The inventories, respectively marked C and D, (forming part of the protocol,) which are forwarded with this report, will show in part the action of the governor in the premises. For the rest he gave a certificate stating the interest of each occupant in the premises occupied, on the back of which the commissioners placed their approval, and it was left to be delivered to the occupant.

"In order to be accurate and prevent disputes hereafter about the title to houses and lots we made a map of New Archangel, (forwarded with this report,) on which every house and dwelling in the town is located and numbered, and as between the claimant and the United States the title defined to it and settled in the inventories. This was thought necessary in order to give, in accordance with your instructions, to each man of property who desired to dispose of it a certificate of title.

"The town of New Archangel" (now Sitka) "was built in the main by the Russian-American Company, and, except the dwellings transferred by them to their employés and the public buildings transferred to the United States, is owned by that company still; yet it has but a possessory interest in the land, as it only had permission to erect buildings upon it; for although it had authority to vest the title of lands in its employés it had no power to vest such title in itself. The commissioners *left the matter as they found it* and the company in possession of its buildings.

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"All the buildings in anywise used for public purposes were delivered to the United States commissioner, taken possession of, and turned over to General Davis, as were also the public archives of the territory, and in a spirit of liberality the wharf and several valuable warehouses belonging to the Russian-American Company were included in the transfer by the Russian commissioner. Both the wharf and the warehouses were very much needed by our people."

In a joint report of the commissioners, termed a protocol, it was stated that there had been delivered to General Rousseau "the forts and public buildings, including the governor's house, dock-yards, block-houses, barracks, batteries, hospitals, wharves, and schools in the town of New Archangel, an inventory of which, marked 'A,' was attached. We gave certificates of ownership to the individual owners of private houses and of lots in fee simple in the town of New Archangel, as directed, a list of whose names is presented in inventory marked C, attached to and made part hereof. In inventory marked D, attached to and made part hereof, are shown the houses and buildings owned by private individuals in New Archangel, the owners thereof having no title in fee to the lands on which they are situated."

The Court of Claims found that "the property in dispute in this suit is not included in inventory C, where are found the names of owners to whom the commissioners gave certificates of title, but, in inventory D, which is a list of buildings the owners of which have no title in fee to the land on which they are situated." No owner of this building was named.

The court further found that after the transfer "William S. Dodge was appointed collector of customs at Sitka, and in June or July, 1868, he was in possession and occupancy of the northern part of the building described in the claimants' petition, which he used as a custom's warehouse. At the same time and afterwards the claimant Sussman was in the occupancy of another part of the building." This occupancy was continued by Dodge and his successors in the office of collector of customs.

In 1869, it having been reported to the War Department

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that a very large part of the property which belonged to the Russian Fur Company was enjoyed by persons claiming title by purchase from that company after the cession of the territory, the Secretary of War directed the military commander of the Department of Alaska to take possession of and retain in his charge all posts, buildings, etc., which were not in fact entitled to be considered individual property. In pursuance of this order, the commanding general took possession of the entire building in question, which has since been claimed and occupied by the government.

Claimant Kinkead protested against this seizure, claiming that the building had been designated as private property; that it had been purchased of the Russian-American Company, and that the title acquired was good, valid, and legal.

It further appeared that in December, 1868, Mr. Ketchum, then collector of customs, assumed to lease from Sussman, as agent for Louis Sloss, to whom the Russian Company had given a deed, part of the warehouse in question at a monthly rental of two hundred dollars. This lease, however, was promptly disapproved by the Secretary of the Treasury, who advised him that no building could be hired by him for any purpose without the previous assent of the department.

It appeared that the territory of Alaska had, prior to its cession to the United States, been occupied by a Russian corporation known as the Russian-American Company, a corporation largely engaged in fur trading. This company had the privilege of making use of the public lands and erecting buildings thereon. It had no right, however, of becoming the owner of such lands, but did have the privilege of conveying parcels of it in fee simple to its employés. Pursuant to this privilege, it had made conveyance of certain of these lands to its employés, upon which had been constructed the dwellings erected by the company and occupied by such employés, their widows or children. Apparently, however, it had no right to acquire for itself any title to the soil, and enjoyed nothing more than the use of the land upon which its buildings were situated, the dominion or right of property therein remaining in the Russian government. The company appears to have

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possessed not only the ordinary powers of a trading corporation, but certain governmental powers, which it exercised arbitrarily, if not despotically, over the entire territory. It had a monopoly of the trade of the territory, and appears to have been in fact a provincial government of the Russian Empire.

As no question is made but that the land upon which this building is situated belonged to the Russian government, and that the building was erected in 1845 by permission of the Emperor, for the use of this company in the storage and sale of its furs and for other trading purposes, and was so constructed of heavy hewn logs as to be incapable of removal, no good reason is apparent for excepting it from the ordinary rule which attaches such buildings to the realty. The presumption is that buildings belong to the owner of the land on which they stand as a part of the realty. *Quicquid plantatur solo, solo cedit.* "If one erects a permanent building, like a dwelling-house, upon the land of another voluntarily and without any contract with the owner, it becomes a part of the realty, and belongs to the owner of the soil." *Madigan* v. *McCarthy*, 108 Mass. 376; Taylor on Land. & Ten., § 544.

It is true there is abundant authority for holding that buildings may by agreement of parties be erected upon land without becoming affixed thereto, and that neither the mode of annexation nor the use thereof is conclusive as to the intention of the parties, although the presumption is that the building so erected becomes a part of the freehold. *Wood* v. *Hewett*, 8 Q. B. 913; *Crippen* v. *Morrison*, 13 Michigan, 23; *Mott* v. *Palmer*, 1 N. Y. 564; *Sudbury* v. *Jones*, 8 Cush. 184; *Howard* v. *Fessenden*, 14 Allen, 124.

The extrinsic evidence, however, in this case, so far from showing an intention on the part of the Russian government that this building should not pass under the treaty, evinces a determination on the part of both governments that it should so pass. Not only did the land belong to the Russian government, but the building was of a size and construction such as to render it practically impossible of removal. The correspondence between the Secretary of State and the Russian

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minister with reference to the sixth article contemplates that there were "*reservations*" and "*possessions*" owned by *associated companies*, Russian or other, which were to pass under the treaty, and the sum of two hundred thousand dollars was added to the consideration money to cover the cession of such properties. More explicit words than those used in article six to distinguish between the property of associated companies, "corporate or incorporate, Russian or any other," and merely "private individual property holders," could scarcely be chosen to express the determination of both countries that the cession should be free and unencumbered by any reservations, privileges, franchises, grants, or possessions of incorporated companies. The private property of individual holders was evidently exempted from the cession for the reason that while the Russian-American Company could not acquire title to the real estate occupied by itself, it could confer such title upon those of its employés who desired to make homes for themselves in that territory. There can be no good reason to doubt that it was intended by this designation of private individual property to include as within the cession not only all real property belonging to the government, but all buildings erected by its permission upon such property, except such as belonged to individuals. Whether the Russian government had the right to make this disposition of the property of the Russian-American Company involves questions of Russian law which we are not compelled to pass upon. It is enough that the Emperor assumed to deal in this way with the property of his subjects. Inasmuch, however, as two hundred thousand dollars were added to the price originally agreed upon, in consideration of the cession of the property of associated companies specified under the sixth article, and as the Russian-American Company appears to have been the only corporation existing in the territory to which the terms of this cession could apply, we may safely assume that this amount was intended to compensate it for its interest in the buildings erected by it. Its charter had already expired in 1862, and had not been renewed at the time of the cession. Its franchises had, therefore, been extinguished, and it can hardly be

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assumed that the letter of Mr. Seward was intended to be confined to such franchises.

It may be remarked in this connection that there is a manifest inconsistency in the positions assumed by the petitioners. Their only right in this building is derived from a deed of the land which confessedly belonged to the Russian government. Yet the whole theory of the petitioners' case rests upon the assumption that the building was erected under such circumstances that it was not intended to become a part of the freehold. Consistency then would seem to require that the deed should be of the building alone, whereas it is, in fact, a deed of the land, and can only pass the building upon the theory that the building was affixed to the land, a theory quite inconsistent with the petitioners' contention. If the building were so constructed as to be removable, there would be some reason for saying that it was not contemplated that it should become a fixture, but the difficulty with petitioners' claim is that they cannot assert title to the building without also asserting title to the land.

It is insisted, however, that the contemporaneous construction of the treaty by those who were authorized to carry it into effect was such as to indicate that the property of the Russian-American Company was not intended to pass. The instructions of the government to General Rousseau were that "the transfer will include the forts and military posts and public buildings, etc., all public lands and all ungranted lots of land, etc., while private dwellings and warehouses are subject to the control of their owners and are not included in the transfer. . . . In order, however, that the said individual proprietors may retain their property as aforesaid," he was authorized to give them a certificate of their right to hold the same. The words "private dwellings," and "individual proprietors" used in these instructions should be construed in connection with the treaty, which reserved only "private individual property." Obviously it was beyond the power, even of the Russian government itself, without a gross violation of the treaty, to enlarge the exception of private individual property so as to include all private property, whether owned by cor-

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porations or individuals. In his report of his proceedings, General Rousseau stated that the town was built mainly by the Russian-American Company, and, "except the dwellings transferred by them to their employés and the public buildings transferred to the United States, is owned by that company still;" that "although it had authority to invest the title to land in its employés, it had no authority to invest such title in itself;" that "all the buildings in anywise used for public purposes were delivered to the United States commissioner, . . . and in a spirit of liberality the wharf and several valuable warehouses belonging to the Russian-American Company were included in the transfer." Whether this was one of the warehouses included in the transfer does not clearly appear, though it was contained in inventory D, which showed the houses and buildings owned by private individuals, the owners having no title to the fee in the land. It is quite clear, however, that it was never intended to invest the commissioners with judicial power to determine the title to property in Sitka; or to pass finally upon the question whether a particular building passed under the treaty or not. If, for instance, the commissioners had inventoried a certain house as the property of A, when in fact it was the property of B, no one would seriously claim that such act would transfer the property from B to A. Or, if they had assumed to list the property of an individual land owner as the property of the government or the Russian-American Company, that it would in any manner change the title to such property, or estop the real owner to assert his title thereto in a court of justice. So, if they assumed to list the property of the Russian-American Company as "private individual property" within the language of the treaty, it certainly would not operate to vest a good title in any one who might see fit to purchase such property from the Russian-American Company, even if he purchased upon the faith or such inventory, as Sloss appears to have done in this case. The truth is, the powers of the commissioners were simply ministerial, and the making of inventories simply a matter of convenience, and a method of determining *prima facie* what property the government should appropriate to

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itself for the time being, and what should be left to the individual proprietors. To treat this inventory as binding either upon the government or individuals would be to acknowledge that the commissioners were invested with judicial powers to determine the title to property. Clearly they had no power to depart from the plain language of the treaty, and no power to bind the government by an assumption that government property was private property, and thus settle questions of title or ownership. The weight that has been given to contemporaneous construction has never gone to the extent of holding that the title or ownership of property may be changed by the action of executive officers appointed to carry a statute or treaty into effect.

The case of *Comegys* v. *Vasse*, 1 Pet. 193, relied upon by the petitioners, is readily distinguishable from the case under consideration. In the treaty with Spain for the cession of Florida, the United States undertook to make satisfaction of certain claims of Spanish subjects, and by article 11, to ascertain the full amount and validity of those claims, a commission, to consist of three commissioners, was to be appointed "to receive, *examine, and decide* upon the amount and validity of all claims," etc. Such commissioners were to act under oath for the faithful discharge of their duties, and were authorized to hear and examine witnesses upon oath, and to receive all suitable testimony. In other words, they were invested with judicial power to pass upon these claims, and their decision, within the scope of this authority, was held to be conclusive and final. Said Mr. Justice Story, (page 212): "The parties must abide by it as the decree of a competent tribunal of exclusive jurisdiction." But even in this case it was held that their authority did not extend to the adjustment of all conflicting rights of different citizens to the fund so awarded. The rights of the several claimants to the fund were left to the ordinary course of judicial proceedings in the established courts of justice. The powers of the commissioners in this case were evidently of a very different character from those delegated to General Rousseau.

It is further contended that the Court of Claims was es-

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topped to consider the question of title by the recitals in the act of Congress of January 17, 1887, 24 Stat. 358, c. 21, referring this claim to that court, in which the building in question is recognized as having been the property of the Russian-American Company. The act recites that "Whereas John H. Kinkead, of Nevada, and Samuel Sussman, of California, did . . . purchase a certain building situated, etc., . . . from the Russian-American Company, *the owner of said building;* and

"Whereas said building had been declared by the protocol of the transfer of Russian America to the United States to be private property; and

"Whereas thereafter the collector of customs of the United States did take from said Kinkead and Sussman a lease of a portion of said building, and entered thereupon; and

"Whereas afterwards General Jefferson C. Davis did seize the whole of said building, on the ground that the same was the property of the United States, notwithstanding the commissioner appointed to ascertain private property had certified the same to be private property: . . .

"Therefore be it enacted, . . . that jurisdiction be, and is hereby, conferred on the Court of Claims to hear the claims, etc., . . . for the rent and value of certain buildings . . . alleged by them to have been acquired by virtue of purchase from the Russian-American Company, upon the evidence already filed in said court, and such additional legal evidence as may be hereafter presented on either side; and if said court shall find that said parties acquired a valid title to said buildings respectively alleged to have been purchased by them, said court shall award said parties a fair and reasonable rent," etc.

In other words, the Court of Claims is required to find, first, whether the petitioners acquired a valid title; second, what shall be deemed a fair and reasonable rent; third, a suitable indemnity for the buildings themselves. Now, as the question whether the petitioners had a valid title to these buildings depended, not upon the fact of purchase from the Russian-American Company, which was admitted in the first recital of

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the statute and never denied by any one, but upon the title of the Russian-American Company, and its right to convey, which had been called in question by the refusal of the Secretary of the Treasury to allow the petitioners' claim for rent, it is impossible that Congress could have intended by the recital to estop the Court of Claims from passing upon the very question referred to it for judicial determination. Petitioners assert that the whole object of the act was to permit the Court of Claims to pass upon the reasonableness of the rent and the value of the building. This theory, however, is not only wholly inconsistent with the enacting words, but with the position assumed by the officers of the government prior to the enactment in question. Indeed, there had been no dispute between the parties as to the amount of the rent; but there had been a seizure of the property by a military officer of the United States under express directions of the Secretary of War, and a total repudiation by the Secretary of the Treasury of the act of Ketchum, collector of customs, in assuming to lease this building, and a denial of any claim for rent. In the face of these proceedings it is wholly improbable that Congress should have admitted the ownership of the Russian-American Company, which was the question upon which the liability of the government wholly depended. Petitioners insist that the Court of Claims should have accepted the preamble as a correct recital of the fact, and should have determined, first, whether the petitioners had acquired the building in controversy by virtue of purchase from the Russian-American Company; and, second, whether the petitioners had acquired a valid title to said building. The fact that Kinkead and Sussman had purchased the building was as distinctly set forth in the first recital as that the Russian-American Company was the owner, and if it were unnecessary for it to determine one question it was equally so to determine the other.

It is well settled, however, that a mere recital in an act, whether of fact or of law, is not conclusive unless it be clear that the legislature intended that the recital should be accepted as a fact in the case. Endlich on Statutes, § 375. It was

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stated by the court in *Branson* v. *Wirth*, 17 Wall. 32, 44, that "whilst the recital of public acts are regarded as evidence of the facts recited, it is otherwise, as we have seen, with reference to private acts. They are not evidence except against the parties who procure them."

We are referred, however, to the case of the *United States* v. *Jordan*, 113 U. S. 418, as sustaining a contrary doctrine. In this case an act of Congress provided "that the Secretary of the Treasury be, and he is hereby, authorized and directed to remit, refund, and pay back, out of any moneys in the Treasury not otherwise appropriated, to the following-named citizens of Tennessee: . . . the amount of taxes assessed upon and collected from the said named persons, contrary to the provisions of the regulations issued by the Secretary of the Treasury," etc. Jordan was one of the parties named in the act. The Secretary of the Treasury having construed the act to mean only that such sums should be refunded as were collected from the persons named *contrary to the provisions of the regulations* issued by the Secretary of the Treasury, this court held that the statute did not admit of that interpretation, nor leave open any question for the court or for the accounting officers of the Treasury, except the identity of the claimants with the persons named in it. "Although the act," said Mr. Justice Blatchford, "speaks of the sums as being 'the amount of taxes assessed upon and collected from the said named persons, contrary to the provisions of the regulations' named, there is no indication of any intention to submit to any one the determination of the question whether the taxes in any case were collected contrary to the provisions of such regulations, or of the question how those provisions are to be construed."

It needs no argument to show that there is a wide distinction between an act directing a particular thing to be done, and an act reciting the existence of a certain fact which had long been a matter of dispute, and which the Court of Claims was authorized by the act to pass upon and determine.

Counsel have also seen fit to lay before us the report of a Senate committee accompanying the bill, which afterwards

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became the act of January 17, 1887, which report was in favor of the justice of the claim. In accordance with this report the committee submitted a bill conferring jurisdiction upon the Court of Claims to hear this claim upon the evidence already filed and such additional legal evidence as might be presented, and directing said court to award a fair and reasonable rent, etc. The bill, however, was amended upon the floor of the Senate by inserting the words, "if said court shall find that said parties acquired a valid title to said buildings respectively alleged to have been purchased by them," thus evincing a clear intention on the part of the Senate to require the petitioners to satisfy the court of the validity of their title to the building. We think it clear there is nothing in the recital of the act which even throws a doubt upon the intention of Congress to require the court to be satisfied of this fact.

The truth is that the whole case of the claimants depends upon the question whether the government was bound by the proceedings of the commissioners in the execution of the treaty. As we have already expressed the opinion that they possessed no power to vary the language of the treaty or to determine questions of title or ownership, it results that their action was not binding upon the government.

The judgment of the court below is, therefore,

Affirmed.

MR. JUSTICE SHIRAS, with whom concurred MR. JUSTICE FIELD, dissenting.

In the case of the *United States* v. *Percheman*, 7 Pet. 51, 86, Chief Justice Marshall said:

"It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated

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and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other and their rights of property remain undisturbed. If this be the modern rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of territory?"

Upon this view of the subject it might be justly expected that when, in 1867, a treaty for the cession of the dominions of Russia in America was concluded between the United States and the Emperor of Russia, the rights of private property would remain undisturbed. Nor would that just expectation be disappointed; for, on reading the treaty, we find explicit provisions, preserving and excluding from the operation of the cession private property. It, however, appears that portions of the ceded territory had been occupied by an association or company known as the Russian-American Company, and which seems to have claimed and exercised an almost despotic control over the sparse population, whether native or Russian, and also to have been possessed, by grant from the Russian government, of certain franchises and privileges, the precise nature and extent of which are not disclosed. Aware of the existence of this company, and apparently fearful lest troublesome contentions as to such special privileges and franchises might afterwards arise, the government of the United States insisted on the insertion in the treaty of an explicit article, providing that the cession of territory and dominion should be declared to be free and unincumbered by any reservations, privileges, franchises, grants, or possessions by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties except merely private individual property holders.

The fourth article of the treaty provided that the Emperor of Russia should appoint an agent or agents for the purpose of formally delivering to a similar agent or agents, appointed on behalf of the United States, the territory, dominion, property, dependencies, and appurtenances which were ceded, and for doing any other act which might be necessary in regard thereto.

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Subsequently, and in pursuance of the fourth article of the treaty, the Russian government appointed Alexis Pestchouroff, and the United States appointed General Lovell H. Rousseau, as their respective commissioners, and these commissioners proceeded to fulfil the duties of their appointment under instructions from their respective governments. The instructions from the government of the United States were as follows:

"Pursuant to the stipulations of the treaty, that transfer will include all forts and military posts and public buildings, such as the governor's house and those used for governmental purposes, dock-yards, barracks, hospitals, and schools; all public lands, and all ungranted lots of land at Sitka and Kodiak. Private dwellings and warehouses, blacksmiths', joiners', coopers', tanners', and other similar shops, ice-houses, flour and saw-mills, and any small barracks on the islands, are subject to the control of their owners, and are not to be included in the transfer to the United States."

The instructions to Captain Pestchouroff from the Russian government were as follows:

"3. All the forts and military posts will be delivered at once to the American military forces that may follow the United States commissioner. . . .

"4. The public buildings, such as the governor's house, the buildings used for government purposes, dock-yards, barracks, hospitals, schools, public grounds, and all free lots at Sitka and Kodiak, will be delivered by Captain Pestchouroff to the American commissioner as soon as practicable.

"5. All the houses and stores forming private property will remain to be disposed of by their proprietors. To this same category belong smiths', joiners', coopers', tanners', and other similar shops, as well as ice-houses, saw and flour mills, and any small barracks that may exist on the islands. . . ." (H. R. Ex. Doc. No. 177, 40th Cong. 2d Sess. p. 19.)

The commissioners proceeded to fulfil the duties imposed upon them, and on October 26, 1867, signed a protocol or statement of their action. It thereby appears that there was delivered to General Rousseau, for the United States, the government archives, papers, and documents relating to the terri-

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tory and dominion therein named; also the forts and public buildings, including the governor's house, dock-yards, block-houses, barracks, batteries, hospital, wharves, and schools in the town of New Archangel, an inventory whereof, marked "A," was attached to the protocol. It further appears that an inventory, marked "B," was attached, describing the church buildings, etc., left in the hands of the Greco-Russian Church; and that an inventory, marked "C," was attached, giving a list of certain lots and houses held in fee simple by persons named; and an inventory, marked "D," was likewise attached, showing the houses and buildings owned by private individuals in New Archangel, the owners thereof having no title in fee to the land on which the buildings were situated.

The building in question in this case was specified in inventory "D" as private property.

Subsequently, on October 28, 1868, the Russian-American Company, by Prince Maksoutoff, its chief administrator, (who had assisted the Russian commissioner in making the delivery and inventory of the property under the treaty,) sold and conveyed the property in question to Louis Sloss, describing it as "that piece or parcel of land situate near and adjoining to the public wharf of said city, upon which is erected building No. 1, and described as a warehouse in the map and inventory 'D,' attached to and made a part of the protocol of the transfer of said territory to the United States by Russia, and therein declared to be private property." The title of Louis Sloss, by deed of October 28, 1868, was declared to have been taken and held by him for and on account of John H. Kinkead and Samuel Sussman.

After the transfer, William S. Dodge was appointed collector of customs at Sitka, and in June or July, 1868, he was in the possession and occupancy of the northern part of the building described in the claimants' petition, which he used as a customs warehouse. At the same time and afterwards the claimant Sussman was in the occupancy of another part of the building. Dodge continued so to occupy the northern part of the building until about the 1st of December, 1868, when he turned it over to Hiram Ketchum, Jr., his successor in the office of collector,

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who continued in the same occupancy till March 4, 1869, when he resigned the office and turned the warehouse over to Samuel Falconer, the deputy collector of the port.

Before and after the last named date, General Jefferson C. Davis, United States Army, was at Sitka in command of the department of Alaska.

On the 26th of February, 1869, there was sent to him from the War Department the following order:

"It having been reported to this department that a very large portion of the property which belonged to the Russian Fur Company in Alaska is now enjoyed by persons claiming title under a purchase from Prince Maksoutoff since the cession of that territory to the United States, the Secretary of War directs that you take possession of and retain in your charge all posts, buildings, etc., which are not in fact entitled to be considered individual property."

In pursuance of this order, General Davis, on the 2d of June, 1869, authorized Falconer to take possession of and use the whole building for government purposes pertaining to the Treasury Department, except the three lower rooms of it situated on the southeast side of the lower passageway, which rooms were reserved by General Davis for the storage of army stores, and were, in the month of September following, placed under the control of the quartermaster's department of the army.

From that time to the present the whole building has remained in the possession and use of the government, Falconer continuing in the occupancy of the part of it so assigned to him until August, 1869, when he turned it over to William Kapus, who had been appointed collector of the port.

On June 2, 1869, the claimants protested in writing to General Davis against his action in taking possession of said building, alleging that the building had been designated as private property by the commissioners appointed by the governments of Russia and the United States; that it had been purchased of Prince Maksoutoff, chief factor of the Russian-American Company; and that the title acquired through that purchase was good, valid, and legal.

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Failing to get redress from the agents and officers of the United States, Kinkead and Sussman brought an action in the Court of Claims for use and occupation of the premises, which suit was by that court dismissed for a supposed want of jurisdiction. *Kinkead* v. *United States*, 18 C. Cls. 504.

Thereafter Congress passed the following act: (act of January 17, 1887, 24 Stat. 358, c. 21.)

"An act referring to the Court of Claims for adjudication the claims of John H. Kinkead, Samuel Sussman, and Charles O. Wood.

"Whereas John H. Kinkead, of Nevada, and Samuel Sussman, of California, did, on the twenty-eighth day of October, eighteen hundred and sixty-eight, purchase a certain building situate on lot known as number one on the official plat of the town of Sitka, in the Territory of Alaska, from the Russian-American Company, the owner of said building; and

"Whereas said building had been declared by the protocol of the transfer of Russian America to the United States to be private property; and

"Whereas thereafter the collector of customs of the United States did take from said Kinkead and Sussman a lease of a portion of said building and entered thereupon; and

"Whereas afterward General Jefferson C. Davis did seize the whole of said building, on the ground that the same was the property of the United States, notwithstanding the commissioners appointed to ascertain private property had certified the same to be private property; and

"Whereas afterward said Kinkead and Sussman did present their petition to the United States Court of Claims claiming rent for the said building; and

"Whereas said court did, on the eleventh day of June, eighteen hundred and eighty-three, dismiss said claim for want of jurisdiction only; and

"Whereas Charles O. Wood, of Ohio, did in like manner purchase a certain other building situate on lot known as number twenty-four from said Russian-American Company,

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and did in like manner present his petition to the Court of Claims for rent of the same, the same having been in like manner seized for the use of the United States, notwithstanding the same had been certified to be private property; and

"Whereas said Court of Claims did in like manner dismiss the claim of said Wood for want of jurisdiction only: Therefore

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction be, and is hereby, conferred on the Court of Claims to hear the claims of John H. Kinkead and Samuel Sussman and Charles O. Wood for the rent and value of certain buildings in the town of Sitka, in the Territory of Alaska, alleged by them to have been acquired by virtue of purchase from the Russian-American Company, upon the evidence already filed in said court and such additional legal evidence as may be hereafter presented on either side; and if said court shall find that said parties acquired a valid title to said buildings respectively alleged to have been purchased by them, said court shall award to said parties a fair and reasonable rent for the use of the said buildings for the time (if any) the same have been occupied by the United States, and also a suitable indemnity for said buildings themselves, and the receipt of such rent and indemnity shall thereafter bar any further claim by said parties for the use of said buildings or for the value thereof; and before receiving the same all of said parties shall execute a release to the United States for all right, title and interest whatsoever in and to the said property, and any defence, set-off, or counter-claim may be pleaded by the United States as defendants as in cases within the general jurisdiction of the court, and either party shall have the same right of appeal as in such cases.

"Approved January 17, 1887."

The claimants thereupon filed in the Court of Claims their petition claiming, under the terms of the special act, "a fair and reasonable rent for the use of said buildings for the time,

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if any, the same had been occupied by the United States, and also a suitable indemnity for the buildings themselves."

That court, on May 13, 1889, decreed that the claimants' petition should be dismissed, and from that judgment the appeal before us was brought.

It was contended, in the court below, on behalf of the claimants, that, under the terms of the act, it was not open for the court to determine whether the claimants were precluded by the treaty from maintaining their claim, but that, as the act, in its recitals, declared that the Russian-American Company was the owner of said building, the court's inquiry was restricted to finding whether the claimants had acquired a valid title to the buildings alleged to have been purchased by them, and to fixing a fair and reasonable rent for the time the same had been occupied by the United States, and also a suitable indemnity for the buildings themselves; and it was also contended that, even if the act of Congress allowed the Court of Claims to inquire into the meaning and effect of the treaty, yet that the claimants were, taking into view the treaty, the protocol and the act of Congress, entitled to recover.

The Court of Claims decided both contentions against the claimants. It held that, notwithstanding the terms of the act, the court had a right to interpret the terms of the treaty, and having found, as it did, that, under the terms of the treaty, the building in question had become the property of the United States, it further held that there was nothing in the acts of the commissioners characterizing the building as private property, or in the act of Congress, referring the matter to this court, which created or conferred any right or title in the building to the claimants.

To sustain their contention that the act of Congress, referring their claim to the Court of Claims, did not leave any question for the court as to the meaning and effect of the treaty, the claimants cite the case of *United States* v. *Jordan*, 113 U. S. 418, 422. There an act of Congress provided for the refunding to persons named therein of the amount of taxes assessed upon and collected from them contrary to the provis-

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ions of the regulations therein mentioned, and it was held that there was no discretion vested in the Court of Claims to determine whether the sum awarded to the suitor was or was not the amount of a tax assessed contrary to the provisions of such regulations. This court said, through Mr. Justice Blatchford, "the Court of Claims held that the statute did not . . . leave open any question for the court, . . . except the identity of the claimants with the persons named in it; and that its language, taken together, was too clear to admit of doubt that Congress undertook, as it had a right to do, to determine not only what particular citizens of Tennessee by name should have relief, but also the exact amount which should be paid to each one of them. We concur in this view. . . . Although the act speaks of the sums as being 'the amount of taxes assessed upon and collected from the said named persons contrary to the provisions of the regulations,' named, there is no indication of any intention to submit to any one the determination of the question whether the taxes in any case were collected contrary to the provisions of such regulations, or of the question how those provisions are to be construed. On the contrary, the clear import of the statute is that Congress itself determines that the amounts named were collected contrary to the provisions of the regulations."

Claimants likewise cite the case of *Dahlgren* v. *United States*, 16 C. Cl. 30, 50, where the Court of Claims, through Judge J. C. B. Davis, construing an act of Congress which had referred a claim to that court, said that "where the government has a special defence to a claim, and the facts constituting the defence are well known to Congress, it is unreasonable to suppose that Congress would refer the claim to this court with the intent that the special defence should be set up and the claim defeated thereby."

It is to be observed that in the case of the act which was the subject of construction in *United States* v. *Jordan*, the decisive language was in the enacting part of the statute, whereas in the statute now before us it is in the preamble. Still, it must be conceded that the language relied upon, although in the preamble, is in absolute and not in conditional terms. The

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Russian-American Company is spoken of as "the owner of said building." The only uncertainty or contingency appears in the language of the enacting clause, wherein it is provided that "if the court shall find that said parties acquired a valid title to said building *alleged to have been purchased by them*, the court shall award," etc. It was further contended on behalf of the complainants that the action of the international commissioners, in distinguishing between public property which should pass to the United States and private property which should not be disturbed, is to be regarded as an act of a diplomatic and political character, and which it was not competent for Congress to refer to the Court of Claims for review or reëxamination. To sustain the proposition that the decisions of international commissions, rendered within the scope of their authority, are final and exclusive, a number of authorities are cited in the brief for the appellants, among others the leading case of *Comegys* v. *Vasse*, 1 Pet. 193, 212. That case arose out of the treaty whereby Spain ceded Florida to the United States, and wherein commissioners were invested with power and authority to receive, examine, and decide upon the amount and validity of asserted claims upon Spain for damages and injuries. This court held, per Story, J., that the decision of the commissioners within the scope of their authority was final and conclusive; that the parties must abide by it as the decree of a competent tribunal of exclusive jurisdiction. The court held, likewise, that though the finding of the amount and right to receive was final, yet the jurisdiction of the commissioners did not extend to determining any disputes that might arise as to the subsequent ownership of such claims. "The validity and amount of the claim being once ascertained by their award, the fund might well be permitted to pass into the hands of any claimant; and his own rights, as well as those of all others who asserted a title to the fund, be left to the ordinary course of judicial proceedings in the established courts, where redress could be administered according to the nature and extent of the rights or equities of all the parties."

Applying the reasoning of that and of kindred cases to the

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present, it is argued that the finding of the commissioners of Russia and the United States was final as to the status of the properties passed upon by them as public or private, that being the purpose for which they were appointed; that it was competent for Congress to refer the dispute that subsequently arose between the United States and the claimants to the Court of Claims; but that the court, in passing upon the case, could not go back of the action of the commissioners, and retry the question under what category, public or private, the property in question was to be regarded.

The court below did not accept the claimants' propositions, but held that it was open to it, under the terms of the act referring the claim to it, to disregard the preamble of the act itself, to go back of the action of the international commissioners, and to decide for itself the meaning and effect of the treaty.

These rulings of the court cannot, in my opinion, be sustained. In the first place, as it seems to me, we must get at the intention of Congress in passing the act referring the claim to the Court of Claims, by bringing into view the history of the claim. In a general way, it certainly cannot be denied that the treaty, in its terms, preserved private property rights. Nor can it be denied that the commissioners were appointed to distinguish public from private property, and to make a finding thereof. It is also indisputable that the commissioners excluded the building in dispute out of the class of public property, and included it in the class of private property. And it is admitted that Congress, having been made aware that the claimants had been turned out of the court on an alleged want of jurisdiction, removed that obstacle, and directed the court to hear the claims of Kinkead and Sussman, and if it should find that they had acquired a valid title to said building, alleged to have been purchased by them, then to award a fair and reasonable rent for its use, and a suitable indemnity for the building itself. I do not feel constrained to hold that the mere recital in the act that the Russian-American Company were the owners of the building at the time the claimants purchased it from them, of itself concludes

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the court from finding otherwise. But I think that, reading the statute in the light of all the facts in the case, it is highly improbable that Congress intended to supersede the action of the international commission, and to submit the treaty to the court for its construction, and I think that the language of the preamble is entitled to be considered, in connection with the other facts of the case, to enable us to give a fair and reasonable construction to this remedial statute.

The conclusion, then, in my judgment, is, that Congress intended that the Court of Claims should inquire whether these claimants had validly derived their title from the Russian-American Company, and, if so, what was a fair rent for the use of the building, and what a suitable indemnity for the building itself.

But, in the second place, if I am wrong in this view, and if the Court of Claims had a right to go back of the language of the statute and of the action of the international commissioners, I think the court erred in their interpretation of the treaty.

In the first article the treaty provides that the Emperor of Russia should cede to the United States "all the territory and dominion now possessed by his majesty on the continent of America." The second article provides that "in the cession of territory and dominion made by the preceding article are included the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property." The view of the court below was, that by the terms "private individual property" was meant property owned by an individual as distinguished from a company or corporation, and the court thought that it was aided in this view by the provisions of the sixth article, which declared that "the cession of territory and dominion herein made is hereby declared to be free and unincumbered by any reservations, privileges, franchises, grants, or possessions by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, except merely private individual property holders."

The origin of this sixth article was in the claims and pre-

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tences of the Russian-American Company, which had exercised a despotic control over these dominions, and the evident purpose of the sixth article, as is plain from the communication of Secretary Seward to the Russian Minister, was to prevent any territorial or political or corporate privileges from being subsequently asserted. It was clearly not intended to include or affect private property as such.

If this were a controversy between private parties, in a court where only municipal law is administered, like a court of common pleas, it may be that the narrow view put on this treaty by the court below might properly prevail. But when we consider that we are dealing with an international instrument, transferring territorial dominion from one sovereign to another, a broader and more liberal construction should be put on the language used. *Hauenstein* v. *Lynham*, 100 U. S. 483; *Head-Money Cases*, 112 U. S. 580. Viewed in this light, I think that the treaty meant to distinguish public property, of the various kinds enumerated, from property held by individual persons or by companies composed of individuals for private uses and purposes. Such was the view taken by the commissioners, and, as I think, by Congress, and their interpretation ought to be respected and adopted by the courts.

Even when corporations are dissolved by writs of *scire facias* or decrees in equity, at the suit of the sovereign, their moneys and property not essential to the exercise of their franchises are not forfeited, but are left to the ownership of the stockholders. In construing the treaty as a mere municipal regulation, and as an act of forfeiture, I think the court below grievously erred.

Upon the whole, I am of opinion that the judgment of the court below was erroneous, and should be reversed, and that the record should be remanded with directions to proceed, under the provisions of the act of January 17, 1887, to examine whether the claimants have lawfully derived title from the Russian-American Company, and, if so, to award them a fair rent for the use and suitable indemnity for the loss of the building owned by them.

Mr. Justice Field concurs in this dissent.

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INSLEY *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 921. Argued and submitted November 21, 1893. — Decided December 4, 1893.

As a District Court of the United States has jurisdiction under Rev. Stat. § 563, of all suits to recover forfeitures incurred under any law of the United States, including forfeitures of a bail bond, the question whether the forfeiture should be enforced by *scire facias* under Rev. Stat. § 716, or by proceedings under a law of the State in which the court is held, goes only to the remedy and not to the jurisdiction, and the action of the District Court is binding in a collateral proceeding.

The rule that the death of a party to a suit, either pending the suit or after judgment and before execution, abates the suit, does not apply to a case where land has been sold upon execution, but no deed delivered.

THIS was a bill in equity brought by the United States to redeem lot 1, block 104, Fort Scott, Kansas, the title to which lot is now held by Elizabeth McElroy, the real defendant in the case. A demurrer was originally filed to the bill upon the ground of laches and was sustained by the court below; but the decree dismissing the bill was reversed by this court, *United States* v. *Insley*, 130 U. S. 263, and the case remanded with a direction for further proceedings.

The substantial facts were that on August 3, 1869, one Moses McElroy became surety upon a bail bond for the appearance of Joseph H. Roe and C. A. Ruther, who had been arrested upon a complaint charging them with a violation of the internal revenue laws. On October 12, 1869, the recognizance was forfeited and a writ of *scire facias* ordered to issue from the District Court of the United States for the District of Kansas against the sureties, requiring them to appear and show cause why the forfeiture should not be made absolute and execution issue. This writ was served upon McElroy, who appeared and moved to quash the writ. This motion was denied; the for-

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feiture made absolute; judgment for $2000 entered against McElroy; and execution issued April 27, 1871, and levied upon the lot in question. This lot, with another also levied upon, had been bought by McElroy of one Bryant on August 5, 1869, for $6000. At the time of this purchase, and to pay for the property, McElroy borrowed of one Palmer $3500, for which he gave a mortgage upon the lots to secure the loan. On May 30, 1871, four weeks after the levy was made, Palmer brought suit to foreclose his mortgage, but did not make the United States a party defendant. On June 6, 1871, the United States bought lot one at the execution sale in satisfaction of its debt. On October 4, Palmer obtained judgment of foreclosure in the sum of $3764.16, with costs. On October 16, the sale to the United States was duly confirmed and a deed ordered. The deed, however, was not executed until October 30, 1883. On October 25, 1871, Palmer took out execution against McElroy, and on December 4 the property was sold under this execution, and bought in for the debt by Palmer. The sale was confirmed January 4, 1872, and a sheriff's deed executed to Palmer.

On January 4, 1872, the title stood as follows:

1. The property had been sold to the United States by sale confirmed October 16, 1871, on a second lien.

2. The property had been sold to Palmer by a sale confirmed December 26, 1871, on a first lien, the United States not being a party defendant.

3. The United States not having been made a party, had the right to redeem and treat the sheriff's deed as a mortgage in the hands of Palmer, and Palmer as a mortgagee in possession.

Nothing was done for over twelve years, when on November 28, 1884, the United States filed this bill, having never been in possession of the property. McElroy and wife remained in possession of this lot with consent of Palmer under an agreement to purchase, until the death of Palmer, in November, 1872, after which the agreement lapsed. Afterwards the Palmer heirs, desiring to sell, made another agreement with McElroy, who acted as agent for his wife, that they would sell the land to Mrs. McElroy, defendant herein. Payments on the property began and slowly progressed through a series of

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years. The property had an earning capacity, and the rents and profits went to Moses McElroy. He died in August, 1881, leaving the property partly unpaid for. In the agreed statement of facts it was admitted that the agreement with the Palmer heirs vested the title and ownership in said land in Mrs. McElroy, except as affected by the claim of the United States in this action, if it should be determined that any such claim or interest existed. After the agreement of purchase had been made by defendant she improved the lands by erecting buildings at an expense of several thousands of dollars, collected the rents, and enjoyed the use and benefit of the property, the rents and profits exceeding by a small amount the principal and interest which would be due under the mortgage of 1869, by way of redemption. The property was finally deeded by the Palmer heirs to the defendant about five years after her husband's death, and after the filing of the bill in this suit.

Upon the hearing in the Circuit Court upon an agreed statement of facts, the bill was again dismissed, and the United States appealed to the Circuit Court of Appeals. The court reversed the decree of the Circuit Court, and a decree was directed in favor of the United States. From this decree an appeal was taken by Insley to this court.

Mr. J. D. McCleverty, for appellants, submitted on his brief.

Mr. Solicitor General, (with whom was *Mr. E. F. Ware* on the brief,) for appellees.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

The question in this case is whether the proceedings by *scire facias*, taken by the United States to enforce the forfeiture of McElroy's recognizance, operated to divest his title to the lands in dispute.

(1) The argument of the appellants in this connection is

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that, under Rev. Stat. § 1014, authorizing commissioners "to take bail in any State where he" (the accused) "may be found, and agreeably to the usual mode of process against offenders in such State," proceedings for the enforcement of bail bonds should conform to the practice in the State where the bond is sued; and that, as the statutes of Kansas do not authorize proceedings by *scire facias* in such cases, but require a formal action, termed in the Code of Kansas a "civil action" against the bail, this practice should also be pursued in the Federal courts; and hence that the judgment of the District Court of Kansas in this case rendered upon a writ of *scire facias* was illegal and void.

But we do not find it necessary to determine whether a *scire facias* was a proper remedy or not. It is a sufficient answer to the appellants' contention that the court had jurisdiction of the subject-matter under Rev. Stat. § 563, which confers upon District Courts jurisdiction of all suits for penalties and *forfeitures* incurred under any law of the United States; and § 716, conferring upon District Courts power to issue writs of *scire facias;* and also that the court had jurisdiction of the person of the defendant, who was not only served with the writ, but appeared and moved to quash the same, apparently for the same reasons which are now urged for holding the proceedings to be a nullity. If McElroy had desired to contest his liability further he should have prosecuted his writ of error from the Circuit Court, which he appears to have sued out, but subsequently dismissed. The error, if any were committed, did not go to the jurisdiction of the court, but only to the particular remedy pursued, and the action of that court in respect thereto was binding in a collateral proceeding. *Hendrick* v. *Whittemore*, 105 Mass. 23.

Nice distinctions were formerly drawn between actions of trespass and case, but it was never supposed that an error in that particular affected the jurisdiction of the court, or could be drawn in question collaterally. Even an objection that an action should have been brought at law instead of in equity may be waived by failure to take advantage of it at the proper time. *Wylie* v. *Coxe*, 15 How. 415, 420; *Reynes* v. *Dumont*,

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130 U. S. 354, 395; *Clark* v. *Flint*, 22 Pick. 231; *Ludlow* v. *Simond*, 2 Caines' Cas. 1, 40, 56.

(2) The objection that McElroy, the judgment debtor, died in August, 1881, after the deed was ordered, but before it was actually executed by the sheriff, and that thereby the judgment became dormant, is equally untenable. It assumes that the general rule that the death of a party to a suit either pending the suit or after judgment and before execution abates the suit, applies to a case where land has been sold upon execution and no deed delivered. It is true that this court held in the case of *Ransom* v. *Williams*, 2 Wall. 313, that when a defendant died after judgment, and execution was subsequently issued without the notice required by the statute having been given to the representatives of the defendant, or the judgment revived by *scire facias*, the execution was a nullity, and all proceedings under it were void. But even in that case a doubt was expressed whether the execution would not be good, if it were tested before the death occurred. The law in such cases, however, acts upon the theory that the defendant is interested in the case, and, therefore, upon his death his personal representatives should be called in. In this case, however, the suit was not only not pending, but the judgment had been satisfied by the sale of the land, and there were no proceedings existing in which McElroy's estate could be said to be interested. The sale was confirmed and deed ordered October 16, 1871, while the death of McElroy took place ten years afterwards. After the property had been sold upon execution, and the United States had bid it in, and the sale was confirmed and the deed ordered, the defendant in the execution received credit for the amount of the sale, which amount, $2467, cancelled the judgment, and left it fully satisfied. There was no judgment to become dormant. In short, the whole proceedings between McElroy and the United States had ceased to exist. The United States stood only in the attitude of a purchaser of the land, with power to call upon the sheriff for a deed. Had the land been bid in by a third party and a deed ordered, it would scarcely be claimed that as to him the suit would have been abated, and yet as a matter of law the posi-

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tion of the United States was precisely the same as would have been that of a third person purchasing the property.

There was no error in the conclusion of the court below, and its decree must, therefore, be *Affirmed.*

IDE *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 155. Argued and submitted December 8, 1893. — Decided December 11, 1893.

The proceedings of a court-martial held upon a captain of infantry in the army of the United States, which resulted in a judgment of dismissal from the service, having been transmitted to the Secretary of War "for the action of the President of the United States," the Secretary endorsed upon them that, "in conformity with the sixty-fifth of the rules and articles of war, the proceedings of the general court-martial in the foregoing cause . . . have been forwarded to the Secretary of War for the action of the President of the United States, and the proceedings, findings, and sentence are approved, and the sentence will be duly executed," and signed the endorsement officially as Secretary of War. *Held*, on the authority of *United States* v. *Fletcher*, 148 U. S. 84, that this was a sufficient authentication of the judgment of the President and that there was no ground for treating the order as null and void for want of the requisite approval.

THIS was an appeal from a judgment of the Court of Claims dismissing the petition of the appellant for a judgment against the United States for unpaid salary as an officer in the army. So much of the findings of that court as are necessary for understanding the judgment of this court on the appeal were as follows:

Findings of Fact and Conclusion of Law. Filed May 26, 1890.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

August 17, 1861, the claimant was appointed and commissioned first lieutenant in the Thirteenth regiment, United States infantry, to rank as such from May 14, 1861.

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July 2, 1862, he was appointed captain in said regiment, to rank from May 14, 1862, and was assigned to the command of Company C, in said regiment, in the service of the United States.

II.

In March, 1869, claimant was tried by a general court-martial upon charges of "absence without leave" and "disobedience of orders," found guilty, and by said court-martial sentenced "to be dismissed the service of the United States."

Alfred H. Terry, the general commanding the department in which said court-martial was held, approved its proceedings, findings, and sentence, and on April 13, 1869, forwarded the record to the Secretary of War for the action of the President of the United States.

May 12, 1869, John A. Rawlins, then Secretary of War, made an order or endorsement on the proceedings and sentence of said general court-martial as follows, to wit:

WAR DEPARTMENT, WASHINGTON CITY, *May* 12, 1869.

In conformity with the sixty-fifth of the rules and articles of war, the proceedings of the general court-martial in the foregoing case of Bvt. Maj. William C. Ide, captain Thirteenth infantry, have been forwarded to the Secretary of War for the action of the President of the United States, and the proceedings, findings, and sentence are approved, and the sentence will be duly executed.

JNO. A. RAWLINS,
Secretary of War.

Thereupon, by command of General Sherman, the Adjutant General issued an order that —

Bvt. Maj. William C. Ide, captain Thirteenth United States infantry, accordingly ceases to be an officer of the army from the date of this order.

The President never confirmed nor disapproved the proceedings or sentence of said court-martial, nor took any action thereon, nor made any orders in the case, unless he did so by some of the facts herein stated.

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III.

Claimant was paid his salary as captain of the Thirteenth infantry to include May 31, 1869. He has never been paid since that date as an officer of the army.

November 20, 1888, he demanded pay as a captain of infantry in the United States Army from May 31, 1869, and received the following reply:

WAR DEPARTMENT, PAYMASTER GENERAL'S OFFICE,
WASHINGTON, *November* 22, 1888.

WILLIAM C. IDE, ESQ., *late Captain Thirteenth Infantry, Buffalo, New York.*

SIR: Your letter of November 20, 1888, demanding pay as an officer of the army from the date of your dismissal under general orders, No. 26, of 1869, to the present date, is received, and in reply you are informed that this office has no authority to recognize any one as an officer of the army, unless his name is borne upon the official register, or notice of his appointment is communicated by the military authorities.

In the absence of any recognition of you as an officer of the army, your claim for payment be and is refused.

Respectfully your obedient servant,

WM. B. ROCHESTER,
Paymaster General, U. S. Army.

Mr. George Wadsworth for appellant.

Mr. Assistant Attorney General Dodge and *Mr. George H. Gorman* filed a brief for appellees, but the court declined to hear them.

THE CHIEF JUSTICE: The judgment is, upon the authority of *United States* v. *Fletcher*, 148 U. S. 84,

Affirmed.

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LONG *v.* THAYER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

No. 471. Submitted November 27, 1893. — Decided December 11, 1893.

T. bought a tract of land in Kansas City of S. & W. under a contract on their part signed by K. as their agent, under which payments were to be made at stipulated times, notes bearing interest to be given for those sums, and a deed to be given on final payment. The agent's authority from W. was in writing; from S., it was verbal. W. died shortly after the contract was made, and before any payment matured. T. went into possession, gave the notes, made payable to K. or bearer, made payments to K. as they became due, without knowledge of the death of W., and improved the property by erecting buildings upon it. On making the last payment he was informed that W. had died. The interests of W. and S. became vested in L., who brought a suit in ejectment against the tenant of T. T. intervened in that suit and his equitable defence being overruled, filed a bill to restrain its further prosecution. *Held*,

(1) That the death of W. revoked K.'s authority to act for him or his estate, and payments made to K. as his agent after his death did not discharge T.'s obligation to his estate;

(2) That whether it also operated as a revocation of the verbal authority given by S., may admit of some doubt, but is unimportant in view of the long silence of S.;

(3) That in view of the character of the notes, and in view of the fact that L. was not an innocent purchaser, but took title with full knowledge of the facts, including the open, notorious and unequivocal possession of the property by T., the decree of the court below, granting a perpetual injunction on payment into court of one half of the purchase money with interest, should be affirmed.

THIS was a bill in equity filed by Thayer to enjoin the enforcement of a judgment obtained by Long against one Townsend R. Smith, a tenant under Thayer, of a lot in Kansas City.

Thayer had bought the lot of Skiles and Western under a contract signed by one J. F. Kinney as their agent, dated June 30, 1870, by which, in consideration of $50 in cash, a promissory note at three months for $102.50 and another note at one year for $150, with ten per cent interest, Skiles and Western

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had agreed to give Thayer a deed, with a proviso that failure to pay either of said notes at maturity should forfeit the contract. A few days thereafter, and on July 9, 1870, Western died. Thayer took possession under his contract and made all the payments as therein required to Kinney, but at the time the last payment was made (August 14, 1871) he was informed by Kinney that Western had died. At the time he made the first payment (September 13, 1870) Western was dead, but Thayer was not informed of it. After Thayer went into possession he erected a frame cottage with the usual outbuildings and improvements, and remained in possession of the premises until the filing of this bill.

In 1885 or 1886 Western's widow married Long, the plaintiff in the ejectment suit, and Western's heirs, Lucy U. Western and Elgin U. Western, made a warranty deed of the land to Long, who shortly thereafter brought suit in ejectment against Townsend R. Smith, Thayer's tenant. Thayer, learning of the suit, intervened and was made a party defendant. He set up an equitable defence, which was overruled as inconsistent with the practice of the Federal courts. Thereupon he filed this bill, and applied for an injunction to restrain Long from further prosecuting his suit. There was no evidence tending to show that any administrator or executor had been appointed for Western's estate, or any guardian for his minor heirs, capable of receiving payment from Thayer. Skiles' interest became vested in Western's heirs by virtue of a partition suit and litigation over the title to the land in question, to which litigation Thayer was not made a party. These partition proceedings occurred in 1873, after Thayer had made his last payment.

Upon a final hearing, the Circuit Court decreed that, upon payment by Thayer into court of the sum of $126.25, with interest at ten per cent from June 13, 1870, the injunction be made perpetual; and that the defendant place in the registry of the court deeds of the interest of the Western heirs, and a quitclaim of his own interest in the property in controversy to the appellant, etc. From this decree the defendant Long appealed to this court.

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Mr. A. H. Garland and *Mr. H. J. May* for appellant.

Mr. P. E. Hatch, *Mr. R. B. Middlebrook*, and *Mr. William A. McKenney* for appellee.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

This case turns largely upon the legal effect to be given to the death of Western, which took place a few days after the contract for the sale of the land was made, and before the first note became due. Had Western not died, there can be no question that the payments to Kinney would have been good, and that Thayer would have been entitled to a deed.

Western's death undoubtedly operated as a revocation of Kinney's authority to act for him or his estate. The payments made to Kinney as his agent would not be sufficient to discharge Thayer's obligation to his estate, even if such payments were made by him in actual ignorance of Western's death. *Michigan Insurance Co.* v. *Leavenworth*, 30 Vermont, 11; *Davis* v. *Windsor Savings Bank*, 46 Vermont, 728; *Jenkins* v. *Atkins*, 1 Humphrey, (Tenn.) 294; *Clayton* v. *Merrett*, 52 Mississippi, 353; *Lewis* v. *Kerr*, 17 Iowa, 73. Indeed it was said by this court in *Galt* v. *Galloway*, 4 Pet. 332, 344, that "no principle is better settled, than that the powers of an agent cease on the death of his principal. If an act of agency be done, subsequent to the decease of the principal, though his death be unknown to the agent, the act is void."

Whether Western's death also operated as a revocation of the verbal authority given by Skiles may admit of some doubt, although the weight of authority is that the death of one partner or joint owner operates, in the case of a partnership, to dissolve the partnership, and in the case of a joint tenancy to sever the joint interest; and the authority of an agent appointed by a firm or joint owners thereupon ceases, where such authority is not coupled with an interest. *McNaughton* v. *Moore*, 1 Haywood, (N. C.) 189; *Rowe* v. *Rand*, 111 Indiana, 206.

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But even if it did operate as a technical revocation of Kinney's authority to act for Skiles, the presumption is, from Skiles' long silence, in the absence of proof to the contrary, that Kinney accounted to him for his proportion of the money collected. The court below evidently proceeded upon this theory, and required Thayer, as a condition for calling upon Long for a deed, to repay one-half of the amount of the two notes with the stipulated interest at 10 per cent. These were certainly as favorable terms as Long could expect. Thayer had paid the money to Kinney, with whom the contract was made — the first payment in actual ignorance of Western's death, and the second doubtless under the supposition, which a person unlearned in the law might reasonably entertain, that payment to the person with whom the contract was made was sufficient, and that Kinney would account to the proper representatives of Western, and procure him a deed. All the equities of the case were in Thayer's favor, and justice demanded that Long should be required to convey, upon being paid Western's share of the consideration with interest.

There is another view of the case which does not seem to have been presented to the court below, and which indicates that Long received even more than he was really entitled to. The second note of $150, which is produced, appears upon its face to have been payable to "J. F. Kinney or *bearer*," and while the first note is not produced, Kinney swears that this was also payable in the same manner. The probabilities are that it was, both from the fact that the second note was payable to bearer and from the further fact that Kinney claimed that Western was largely indebted to him. If such were the case (and Kinney's authority to take these notes is not disputed) it is difficult to see why the payments to Kinney, who himself held the notes, were not valid payments, which entitled Thayer to a deed to the land. So long as these notes were outstanding, he could not safely pay to any one else, and if he paid the holder, he did just what the contract required him to do.

Long clearly was not an innocent purchaser of the land in question. Not only had Thayer been in the open, notorious, and unequivocal possession of the land and its improvement,

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renting the premises and paying the taxes, but Long's marriage into the Western family, his taking a deed from the heirs through Mr. Meriwether, the husband of one of the heirs, who acted as attorney both for Long and for the heirs, and the giving of a promissory note unsecured by mortgage upon the land — a note which the heirs apparently never saw — indicate very clearly that he could not have been ignorant of the true situation.

The decree of the court below was clearly right, and must be

Affirmed.

LATTA *v.* KILBOURN.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 97. Argued November 21, 22, 1893. — Decided December 11, 1893.

A decree in chancery, which determines that a partnership existed between the parties, that one partner is entitled to recover of the other a share in the profits of the partnership business, that the defendant partner account to the plaintiff partner, and that the case be referred to a master to state such account upon proofs, is not a final decree.

The plaintiff set up in his bill a verbal contract of partnership between the defendant and himself in the buying and selling of real estate, and called for an answer under oath. The defendant answered under oath, denying positively and in direct terms the existence of the alleged contract of partnership. *Held*, that, under well settled rules of equity pleading and practice, this answer could be overcome only by the testimony of at least two witnesses, or of one witness with corroborating circumstances, and that the proofs in this case fail to break down the defendant's denial.

The violation by one partner of his undertaking to give to the firm or his associate an opportunity or option to engage in any particular transaction, not within the scope of the firm's business, does not entitle his copartners to convert him into a constructive trustee in respect to the profits realized therefrom.

An agreement by partners that no one of them should engage in the buying and selling of real estate on his own account does not entitle the other partners to share in profits made by one of them in real estate speculations, entered into by him without first securing the assent of his copartners.

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Statement of the Case.

Dean v. *McDowell*, 8 Ch. D. 345, approved and followed.

If a member of a partnership uses information obtained by him in the course of the transaction of the partnership business, or by reason of his connection with the firm, for purposes wholly without the scope of the partnership business, and not competing with it, the firm is not entitled to an account of any benefit derived therefrom.

THE appellees, as members of a dissolved copartnership, brought this suit against the appellant, another member thereof, for an account of profits made by the latter in certain transactions alleged to have been within the scope of the partnership business, and which, as claimed, it was his duty to have conducted for the benefit of the firm instead of for his individual advantage.

The material facts of the case, as disclosed by the pleadings and proofs, are as follows. In 1865 there existed in the city of Washington a copartnership composed of R. M. Hall, C. H. Kirkendall, and Hallet Kilbourn, under the name of Hall, Kilbourn & Company, which was formed for the purpose of carrying on the business of "real estate brokers and auctioneers." The scope of this partnership, as indicated by the nature of its business, was one of agency, and consisted in negotiating and making sales and purchases of real property for the account of others.

In the latter part of 1865, Kirkendall withdrew from the firm, and the appellant Latta acquired and succeeded to Hall's interest therein, and thereafter the business of copartnership was conducted under the the name of Kilbourn & Latta. These changes in the membership of the firm were attended with no change in the nature and scope of the partnership business, which continued the same after Latta came into the firm as before, except that the business of auctioneers was discontinued.

The partnership agreement of the former firm, as well as that of Kilbourn & Latta, was in parol, and the business of each, as proclaimed to the world by their advertising cards in the newspapers, by the sign at the firm's place of business, by letter heads, and as published in the city directory, was that of "real estate and note brokers," and consisted in buying and selling

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real estate on commission, renting houses, and negotiating loans. Kilbourn & Latta, as a firm, had no capital and owned no property except a few articles of office furniture of little value; nor was there any agreement, arrangement, or provision made by which capital was to be supplied for the use of the firm, if any should be needed or required in the conduct of its business. The personal services of the partners constituted the only means of carrying on the business of the firm, and each member was to share equally in the profits and losses of the business. Kilbourn was without means, while Latta was possessed of considerable property.

During the existence of this partnership, which continued from 1866 to January 1, 1871, each member of the firm, with the knowledge of his copartner, purchased real estate and other property on his private or individual account, and no question was ever made by either partner of the right so to do, nor did either partner ever claim that the profits realized on such purchases should be treated as belonging to the firm, or were subject to division among its members. By special agreement, and as a special venture, the partners purchased on firm or joint account two parcels of land on speculation — the money to make the purchases being advanced by Latta, in whose name the title was taken. In the same way, by special agreement, they purchased bonds and other securities, and special accounts of such transactions were kept upon the firm's books. In several instances the partners, by special and mutual agreement, in lieu of commissions took a share of the profits in property purchased and sold for the account of others, without assuming or incurring any responsibility for losses.

The two purchases of real estate on joint account, as well as those in which the partners of the firm took a share of profits in lieu of commissions, were special ventures in each case, entered into after special agreement between the partners, and were in no sense within the terms or objects, expressed or implied, of their regular partnership business. The scope and character of the firm's business did not extend to the buying and selling of real estate on account of the firm. It had no capital for that purpose, and no arrangements were

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Statement of the Case.

provided by which it was to be supplied. The profits of the business were drawn and distributed as fast as earned.

On January 1, 1871, John F. Olmstead, who had been for many years a clerk for Kilbourn & Latta at an annual salary of twelve or fifteen hundred dollars, was admitted as a partner into the firm. The new partnership carried on its business under the same firm name of Kilbourn & Latta — the respective interests of the partners being three-eighths of the profits of the business each to Kilbourn and Latta, and two-eighths to Olmstead. This new firm, like the former, had no written articles of copartnership. The scope and character of its business, as well as the respective interests of the partners therein, rested in parol. Olmstead brought no means into the concern, and neither the firm nor any member thereof, except Latta, possessed any property or capital. There was not only no provision or agreement for the accumulation of firm capital, but the course of business was directly the reverse, the habit of the partners being to draw against their respective shares of the profits, and on December 31 of each year the accounts were adjusted, and whatever balance each member of the firm had to his credit was drawn out of the firm and placed to his individual credit. The profits of the business in which alone the partners were to share were thus annually divided and distributed according to their respective interests.

Under this new firm, as under the old, the scope and character of its business, as indicated and made known to the public through the sign over its place of business, in the cards which it advertised, in the city directory, and its letter heads and envelopes, was that of "real estate and note brokers." Aside from the scope and character of the firm's business as thus described and brought to the notice of the public, each of the three partners testified that the new partnership was a continuation of the business of the former firm of Kilbourn & Latta.

Latta states that "there was no change whatever made at the time he (Olmstead) came in as to the terms of the partnership or the scope of the partnership business."

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Statement of the Case.

Kilbourn states that he does "not remember now of any change late in the year 1870 in the firm of Kilbourn & Latta, except the agreement to take in Mr. Olmstead and the change in the division of the profits. In all other respects the firm continued afterwards just as it was before."

Olmstead testifies: "After I became a member of the firm it was agreed that we should do a brokerage business and a commission business, that we should buy and sell property when opportunity offered, and we had the facilities for doing it, and we should buy and sell securities, and do a general brokerage business, and a general commission business, a general speculative business. I have stated all the stipulations substantially as well as I can recollect them. These stipulations were entered into in one of the last days of December, 1870. I don't know that there was any discussion as to whether the business of the firm was to be different after I entered it from what it was before. I don't know that there was any new arrangement touching the business in which the firm was to embark. The partnership business of the firm was, as I understood, to be just what it had been. They were to go on and to do what they had been doing for a year or two, with the same scope and breadth."

It was further testified by Kilbourn and Olmstead that when the latter came into the firm in January, 1871, an arrangement or stipulation was made that all real estate which was considered a bargain was to be first offered to the firm, or the members thereof, for purchase; that if the firm or any member thereof declined to make the purchase, the others could take it if they so elected, and if two declined one could take it, but that the firm was to have the first opportunity, and that it was left optional with the firm, and with each member thereof, to join in such purchase. Olmstead in his testimony states this alleged stipulation or arrangement as follows:

"There was an agreement that knowledge of any property that was offered for sale or any property that any of the members of the firm knew about should be communicated to the firm, and if they saw fit and were in condition they could

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buy it; and if either member declined the other two could; or, two declining, one could; but everything pertaining to real estate was to be for the benefit of the firm and to be communicated to the firm. That was a verbal agreement. The first time I remember of its being fully talked about was a month or six weeks before we moved uptown, somewhere in the latter part of March or 1st April, 1871. After we went uptown it was talked about several times; it was an express injunction or stipulation of Mr. Latta's.

"There was one stipulation (I call it a stipulation) which was agreed on, a proposition made by Mr. Latta in the office on Seventh street and F, that I remember.

"Q. Was that after you entered the firm?

"A. Some little time before we made the purchase of part of lot 5, in square 157, and that was (what I have stated in the bill as nearly as I can state it now) that the knowledge or information or anything touching real estate should be communicated to the members of the firm; that any purchases of real estate should be for the benefit of the whole firm; that if any member did not wish to come in or was not conditioned to come in, the other two might, or, if two declined, then one might; the first and foremost was that everything pertaining to real estate operation and speculations was to be for the benefit of the firm. That was one of the conversations with Mr. Latta. . . . He wanted it very emphatically understood that what was done by the members of the firm was for the benefit of the firm in the way of real estate business operations.

"Q. No matter what form it took on?

"A. He stated what form — *that if he heard of any piece of property being for sale and saw an opportunity to make a speculation, or going into any interest in any operation, that it should be communicated to the other members.*"

Kilbourn states the arrangement as follows:

"Well, the agreement was to continue the business as we had been carrying it on, as it was laid down by Mr. Latta and acquiesced in and specially announced by Mr. Latta that in governing our business in the future in regard to the real

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estate transactions, all information with reference to the purchase and sale or negotiation of real estate acquired should be submitted with a view that if the firm desired they could take advantage of such information and operate in behalf of the firm or any members of the firm, if the firm did not wish to take hold as a firm. There were several talks and conversations with regard to the business at various times.

"Q. Was there any agreement as to either member of the firm buying and selling real estate on his own account?

"A. The only agreement was, as I stated before, that all knowledge or information with reference to the property whatever developed was in the minds of any one of the members a good investment it must be submitted to the firm, and if the firm did not want it or did not like it, then any member of the firm had the privilege of buying. The first condition precedent was that the firm should be advised of everything in relation to real estate transactions coming within the knowledge of the firm. It was laid down by Mr. Latta himself very emphatically, and after we moved up to Fifteenth and G streets he referred to it once or twice."

He further testified —

"The arrangement in 1871, after Mr. Olmstead came in, was that all property which was considered a bargain was to be first offered to the firm for purchase, and if they wanted to go in, well and good. If either one declined the others could take it if they wanted to, and if two declined the third one could take it; but the first consideration was to give the firm the opportunity.

"It was a positive and emphatic agreement that all matters connected with real estate, or operations in real estate that suggested themselves as good things to either one of the partners, should be presented to the firm; that all information in connection with real estate should be stated to the firm, and that in the matter of purchasing real estate the firm was to have the first opportunity. If either member declined to go in, then the other two could; and if two members declined, then the other member had the privilege. That was a positive agreement suggested and laid down by Mr. Latta himself. It

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was stated when we were considering the question of taking Mr. Olmstead into the partnership, and it was agreed upon when we entered into the partnership, and reference was made to it two or three times subsequently. It was simply a parol agreement."

Latta, both in his answer and testimony, positively denied this stipulation.

This firm continued in existence from January 1, 1871, to January 1, 1877, when it was dissolved. During this period one or more parcels of land were purchased as a speculation on joint account by the members of the firm, after special agreement so to do had been entered into between them. These transactions, like those of the former firm, were special ventures entered into after a special agreement between the partners, to make the particular purchases. Bonds and other securities were also purchased from time to time under and in pursuance of special agreements between the partners.

These bond transactions were entered upon the books of the firm under what is called the "bond account," while the joint real estate transactions were kept under an account styled or headed "Kilbourn, Latta & Olmstead." This new firm did not, however, in any case make any speculative purchases of real estate on joint account with others, or upon any agreement or arrangement to take a share of the profits in lieu of commissions. All the transactions on either firm or joint account, other than the brokerage business of the copartnership, were discussed and specially agreed upon before they were entered into.

Purchases on his individual account were made by Latta, the appellant, during the existence of the firm with the knowledge of one or both of the other partners, and without objection being made thereto. Among other purchases made by him, in his individual name and for his individual account, were lots 34, 35, and 36 in square No. 445, in the city of Washington, designated as the Thyson lots, on the sale of which profits were made by him. Olmstead knew of the purchase of these lots as early as 1873, and neither made objection thereto, nor set up any claim on behalf of the firm or of

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the partners thereof, to a share of the profits made by Latta from the sale of the same.

In December, 1871, Latta entered into an agreement with Dr. Stearns by which they undertook to engage in the buying and selling of real estate in the District of Columbia on joint speculation, upon the terms that the capital to be invested should be furnished by Stearns, which, with interest, was to be first paid out of the proceeds of the sales of the property to be bought, and after the payment of all expenses the net profits of the speculation should be equally divided between the parties. Each party was to be equally responsible for any losses that might be sustained. Under this arrangement between them a number of lots and parcels of land were purchased in 1872, the titles to which were taken generally in the name of Stearns, but in one or more instances the title to property purchased was taken in the name of Latta. The purchases and sales of the lots and parcels of ground made by Stearns and Latta on joint account were conducted through the firm of Kilbourn & Latta, and were entered upon their books, and the firm received the regular commissions thereon, which amounted to about $5000.

Before these purchases on joint account were closed out, and the profits thereon were realized and distributed, Stearns, under date of July 30, 1872, executed and delivered to Latta a certificate, which recited that the real estate purchased under their arrangement was held by him on joint account, and that the terms of the joint account were as follows:

"The cash payments have been made by me; the future or deferred payments, principal and interest and taxes, are to be paid by me. I am to determine when, at what price, and on what terms any portion of it may be sold; and when any proportion of it is sold, I am to be repaid all the money I have paid out on account of that portion with six per centum interest on the amount. Then after all costs and expenses of the sale shall have been paid the net profits are to be divided equally between the said Latta and myself.

"JOHN STEARNS.

"Mr. Latta has a copy of this."

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While this certificate of Stearns does not mention losses, it is satisfactorily shown that Latta was to divide the losses in the event the property, when sold, did not realize costs and expenses, and in one instance he did divide with Dr. Stearns the loss upon a parcel of ground purchased on joint account. For some of the purchases made on joint account with Stearns, Latta executed his individual notes, and in the course of the business drew from and deposited with the firm of Kilbourn & Latta funds for the account of Stearns growing out of their joint enterprises.

While Latta did not consult his copartners, or obtain their assent to his engaging with Stearns in the joint purchases of real estate, he took no means of concealing it, and we are satisfied from the testimony in the case that Olmstead knew of these transactions of Latta with Stearns as early as 1873. He admits that he had a suspicion of it in 1874. The book-keeper of the concern states that he cannot understand how the other members could fail to know of it, and a disinterested witness, William H. Philip, testified that about May, 1873, when he inquired for Latta at the office of the firm, Mr. Olmstead stated that Mr. Latta had gone to Europe, and, in reply to the question whether for business or pleasure, further stated that "Mr. Latta had just closed out some real estate, or perhaps a large amount of real estate, that he and Dr. Stearns were interested in," and that a part of his business in going to Europe was to see Dr. Stearns and settle up their matters.

This direct testimony, in connection with the facts and circumstances surrounding the transaction of the business, leaves little or no room to doubt that Olmstead knew of the joint enterprises of Stearns and Latta as early as 1873.

This second firm of Kilbourn & Latta was dissolved in January, 1877, and, thereafter, in November, 1877, the appellees filed their bill against the appellant, in which, after reciting many of the facts already stated, they claimed that the purchases of the Thyson lots and the joint purchases made with Stearns were properly partnership transactions, and that he

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(Latta) was accountable to them for the profits realized out of the same. The bill alleged that the profits realized from the purchases made with Stearns amounted to about the sum of $45,000, which was equally divided between Stearns and Latta, and that no part thereof was turned over to the firm of Kilbourn & Latta, but that it was wrongfully appropriated by Latta to his own use. The complainants further averred that they had no knowledge of these transactions of Latta & Stearns until after the dissolution of the partnership, and that Latta had conducted the same secretly and thereby had defrauded the complainants.

By the third paragraph of the bill it was averred that the copartnership was entered into for the purpose of carrying on the business of real estate agents and brokers, and the *purchase and sale of real estate* in the District of Columbia; and also averred that it was "further stipulated by said partnership agreement, by and between the plaintiffs and defendant, that all profits resulting from operations in real estate by said firm of Kilbourn & Latta, or by any member thereof during the existence of said partnership, should belong to said firm, and be entered upon the books of the firm, and paid into the partnership account; and it was further stipulated in said agreement that any information obtained by any member of said firm during the existence of said copartnership touching real estate with reference to its sale or purchase, or the consent of the owner of said real estate to sell the same, or the desire of any person to purchase real estate in said District, was to be communicated to said firm of Kilbourn & Latta, for the consideration of the several members, and the action of the firm thereon, and it was expressly agreed in said copartnership agreement that no member of said firm should, during the existence of said copartnership, engage in the business of buying and selling real estate in said District, on his own account, or with any other person or persons, except in cases where the proposed transaction had been explained to the firm, and said firm had declined to take any part therein. That pursuant to said agreement the said copartnership firm of Kilbourn & Latta entered upon the business for which it was formed, and con-

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tinued said business for six years, to wit, from January 1, 1871, to January 7, 1877, on which last named date the said copartnership was dissolved."

After considerable proof had been taken the bill was amended by adding to the first paragraph of section four the averment "that by said agreement, after the payment of all expenses, and returning to said Stearns the amount invested by him, with interest thereon, the profit on sales of such real estate purchased for said Stearns were to be equally divided between him and said Latta. That said Latta, under said agreement, in fact, was to act as the broker of and for said Stearns, and to receive as compensation for conducting said business and furnishing and using therein the experience, information, and facilities which he possessed and enjoyed as aforesaid, one-half the net profits on all sales of real estate so purchased for said Stearns."

The prayer of the bill was as follows:

"1st. That the said defendant be ordered and adjudged to pay to the plaintiffs their full share of the profits arising from the said sales of real estate by the said John Stearns and James M. Latta, under and by virtue of their said secret agreement, together with the interest thereon, amounting in all, as plaintiffs are advised and believe, to the sum of sixty-five thousand dollars.

"2d. That said defendant be ordered to pay to the plaintiffs their just share of the proceeds of the sale of said lots 35 and 36, square 445, together with the interest thereon.

"3d. That said defendant be ordered to convey to the plaintiffs their just share in and to said lot (34), square 445.

"4th. That he be required to answer this bill under oath as fully and faithfully as if specially interrogated thereto.

"5th. That the plaintiffs may have such other and further relief in the premises as the nature of the case may require, and to your honors may seem meet and proper."

The defendant answered the bill under oath, and after admitting its formal allegations in reference to the existence and dissolution of the partnership of Kilbourn & Latta, denied that it was ever agreed, either in writing or by parol, that said

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firms or either of them was to carry on the business of buying and selling real estate on partnership account, and that at no time, in fact, did either of said firms undertake to carry on such business; that by the terms of the copartnership agreement the scope and character of the business of each of said firms was that of "real estate and note brokers;" that this business continued the same after Olmstead came into the firm as before, and that it was so advertised to the world.

He further denied the allegations of the bill that there was any agreement, either written or in parol, that all profits resulting from operations in real estate by such firm, or any member thereof, should belong to the firm and be entered upon the books thereof, and be paid into the partnership account; or that there was any written or verbal stipulation that information obtained by any member of the firm during the copartnership, and touching real estate with reference to its sale or purchase, or the consent of the owner to sell the same, or desire of any person or persons to purchase real estate in the District of Columbia, should be communicated to the firm for the consideration of the several members, and the action of the firm thereon; or that it was agreed that no member of said firm should, during the existence of the copartnership, engage in the business of buying and selling real estate in the District of Columbia on his own account, or with any other person or persons, except in cases where the proposed transaction had been explained to the firm and it had declined to take part therein.

The answer also denied that either partner was under any disability to engage in the business of buying and selling real estate on his own account, or with any person or persons, without consulting the firm or the members thereof, and obtaining their consent so to do.

In his answer to the amended bill the respondent denied that he was to act as the broker of Stearns in their joint transactions; that he was to receive one-half of the profits on the sale of the real estate purchased by them as compensation for conducting the business and using therein the experience, information, and facilities he possessed as a member of the firm of

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Statement of the Case.

Kilbourn & Latta; and averred that by the terms of his contract with Stearns the purchases and sales made in pursuance thereof were to be on joint account, each party being entitled to share equally in the profits, and be equally responsible for one-half of the losses that might result. The answer furthermore set up the statute of frauds as a bar to the enforcement of the alleged new stipulations entered into when Olmstead came into the firm to the effect that the copartnership or the members thereof should be first given the option to take bargains in real estate before the individual members should make purchases thereof.

The defendant averred that all the real estate transactions entered into by either the first or the second firm of Kilbourn & Latta were the subjects of special agreements beyond the regular business of the copartnership, and that there never was a time during the continuance of either firm when, by virtue of the nature or scope of the copartnership business, and irrespective of special authority, either partner had the right to bind the firm or his copartners in respect to the purchase and sale of real estate; and, further, alleged the general facts already mentioned, in reference to the copartnership and its business.

After voluminous proofs had been taken the cause came on to be heard in the Supreme Court of the District of Columbia, October 27, 1886, when the complainants abandoned all claims against the defendant on account of the matters set forth in the sixth paragraph of their bill, relating to the Thyson purchases, and covered by the second and third prayers for relief, and thereupon the following decretal order was entered: "That the complainants are entitled to recover from said defendant their full share, viz., five-eighths of all profits realized by said defendant from said sales of real estate, referred to in the pleadings and proof in this cause, made by said John Stearns and said defendant, with interest thereon from the time when the same were so realized, it is, this 27th day of October, A.D. 1886, ordered, adjudged, and decreed that said defendant do account to the complainants for their said share of the profits aforesaid; that this cause be, and the same

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hereby is, remanded to the court in special term, with instructions to refer the same to the auditor of the court to state said account upon the proofs in the cause, and such further proofs as the parties may offer, and for such further proceeding as may be lawful and proper under this decree; and that said defendant pay all costs of the cause." 5 Mackey, 304.

In accordance with that decree the cause was referred to the auditor of the court, who, after taking further proof, made his report showing that there was, on January 1, 1888, due the complainants from the defendant, on account of the latter's real estate transactions with Stearns, the sum of $21,562.59, with interest on $12,030.50 thereof from that date until paid. This report was excepted to, but the exceptions were overruled, and the report was confirmed November 30, 1888, and a decree entered in favor of the complainants against the defendant for the amount reported and costs of the suit. From that decree the present appeal was prosecuted.

Mr. Walter D. Davidge for appellant.

Mr. Enoch Totten and *Mr. William F. Mattingly* for appellees, to the question of jurisdiction, said:

The decree of October 27, 1886, was a final decree. It disposed of every matter in dispute in the pleadings. It practically established and declared the following, to wit: (1) That the agreement of copartnership is valid notwithstanding the fact that it was not in writing; (2) That the copartnership agreement did prohibit the defendant from engaging in buying and selling real estate in the manner pursued by him in connection with Stearns; (3) That the plaintiffs were entitled to five-eighths of all profits realized by the defendant out of the transactions with Stearns mentioned in the pleadings and proofs; (4) That the defendant should account to the plaintiffs for their share of the profits received by him; (5) That the cause should be remanded to the special term, thence to be referred to the auditor to state an account between the parties, and for such further proceedings as might be "*lawful*

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and proper under the decree;" (6) That the defendant should pay all costs.

Such a decree ended the litigation and settled the whole controversy between the parties, so far as the pleadings and evidence disclosed them at that stage of the cause. When it was passed, nothing remained but a mere matter of computation, so far as the cause was then developed, and the reference to the special term was for the purpose of executing the decree according to its terms. *Thomson* v. *Dean*, 7 Wall. 342; *Lewisburg Bank* v. *Sheffey*, 140 U. S. 445; *McGourkey* v. *Toledo & Ohio Central Railway*, 146 U. S. 536; *Forgay* v. *Conrad*, 6 How. 201; *Winthrop Iron Co.* v. *Meeker*, 109 U. S. 180; *St. Louis &c. Railroad* v. *Southern Express Co.*, 108 U. S. 24; *Missouri, Kansas &c. Railway* v. *Dinsmore*, 108 U. S. 30; *Whiting* v. *Bank of the United States*, 13 Pet. 6; *Bronson* v. *Railroad Co.*, 2 Black, 524.

It is respectfully submitted that the appeal should be dismissed for want of jurisdiction.

Mr. Justice Jackson, after stating the case, delivered the opinion of the court.

It is first contended on behalf of the appellees that this appeal cannot be entertained by this court for the reason that the decree of October 27, 1886, was the final decree in the cause from which an appeal should have been taken. We are clearly of opinion that this proposition cannot be sustained. It is well settled by the decisions of this court that where the purpose of the suit is to obtain an account, such as that prayed for by the bill in this case and directed by the order of October 27, 1886, the decree is of such an interlocutory character that no appeal will lie therefrom. *Beebe* v. *Russell*, 19 How. 283, 285; *Green* v. *Fisk*, 103 U. S. 518; *Keystone Manganese Co.* v. *Martin*, 132 U. S. 91; *Lodge* v. *Twell*, 135 U. S. 232; *McGourkey* v. *Toledo & Ohio Central Railway*, 146 U. S. 544, 550. In this last case the authorities are thoroughly reviewed as to what constitutes a final decree, and it was laid down as the general rule that if the court made the decree

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fixing the rights and liabilities of the parties, and thereupon referred the case to a master for a ministerial purpose only, and no further proceedings in court are contemplated, the decree is final; but if it referred the case to him for a judicial purpose, as to state an account between the parties upon which a further decree is to be entered, the decree is not final.

In decretal orders, like that of October 27, 1886, the whole case is open for revision, and the court may change its rulings relating to the merits when the cause comes on for final hearing upon the account. *Fourniquet* v. *Perkins*, 16 How. 82, 84.

The claim made by the amended bill that Latta in the transactions with Stearns acted only as a broker, and that his share of the profits realized therefrom was only by way of compensation for conducting such business and using therein the experience, information, and facilities he acquired from his connection with the firm, (which was denied under oath,) has not been insisted upon, and was clearly based upon a mistaken idea as to the true character of the purchases made on joint account by Stearns and Latta. It is not material to determine whether those purchases constituted a partnership between Stearns and Latta, or created the relation of tenants in common between them. The right of control retained by Stearns would indicate that their relation, in respect to these purchases, was that of tenants in common. *Clark* v. *Sidway*, 142 U. S. 682, 690.

The court below based its opinion upon two grounds: First, that the scope of the copartnership business and agreement, as alleged in the third paragraph of the bill, (quoted above,) was established, and that the appellant could not engage in purchases of real estate on his own account or in connection with others, except by the consent of his copartners, without violating the duty and obligation which he owed to his firm; and, secondly, that even if the copartnership did not include the business of buying and selling real estate on partnership account, still the appellant could not employ the knowledge and information acquired in the course of the partnership business in respect to the real estate market, in making purchases or transactions for his own benefit.

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Opinion of the Court.

The general principles on which the court proceeded admit of no question, it being well settled that one partner cannot, directly or indirectly, use partnership assets for his own benefit; that he cannot, in conducting the business of a partnership, take any profit clandestinely for himself; that he cannot carry on the business of the partnership for his private advantage; that he cannot carry on another business in competition or rivalry with that of the firm, thereby depriving it of the benefit of his time, skill, and fidelity without being accountable to his copartners for any profit that may accrue to him therefrom; that he cannot be permitted to secure for himself that which it is his duty to obtain, if at all, for the firm of which he is a member; nor can he avail himself of knowledge or information, which may be properly regarded as the property of the partnership, in the sense that it is available or useful to the firm for any purpose within the scope of the partnership business.

It therefore becomes necessary, in testing the liability of the appellant to account for the profits realized from the transactions with Stearns, to consider and ascertain what was the scope of the partnership agreement in reference to the purchase and sale of real estate. This is the underlying and essential fact on which rests the proper determination of the question whether the appellant, in engaging in the joint enterprises with Stearns, violated any duty or obligation which he owed to the firm of Kilbourn & Latta. In other words, the question on this branch of the case depends entirely upon this: Were or were not those transactions within the scope of the firm business, in respect to which Latta owed a duty to his firm, or in respect to which he could properly be said to be the agent of the firm?

In his answer, which was called for under oath, Latta positively and in direct terms denied the allegation of the bill that it was ever agreed that the firm should carry on the business of buying and selling real estate, and that at no time was such transaction within the scope of the partnership business.

Under the well-settled rules of equity pleading and practice, his answer must be overcome by the testimony of at least two

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witnesses, or of one witness with corroborating circumstances. The proofs in the present case not only fail to break down his denial on this point, but on the contrary affirmatively establish that neither under the first nor the second firm of Kilbourn & Latta did the partnership agreement extend to the business of buying and selling real estate either for investment or for speculation on firm account. Neither of the appellees testified to the contrary. The appellee Kilbourn, when pressed upon the question, evaded a reply thereto, and Olmstead, in his sworn testimony, failed to support the allegation of the bill as made on that particular subject. On the other hand, the testimony of the appellant fully supported the denial of his answer, and he is corroborated by all the facts and circumstances in the case, such as the character of the business as advertised and as actually conducted. The well-known characteristics of "real estate and note brokers," indicating, as the words imply, those engaged in negotiating the sale and purchase of real property for the account of others, afford a presumptive limitation upon the scope of the business, such as the appellant asserted and testified to in this case. His sworn answer and testimony on this point has not been overcome by the vague and equivocal testimony of the appellees. The court below was in error in finding as a matter of fact that the partnership extended to the buying and selling of real estate for the account of the firm. There is, therefore, no right on the part of the complainants to relief in this cause, based upon the consideration that the scope and character of the partnership business embraced the purchase and sale of real estate, either for the firm alone, or jointly with others.

The further allegation of the bill, "that all profits resulting from operations in real estate by any member of the firm of Kilbourn & Latta during the existence of said partnership should belong to said firm and be entered upon the books of the firm and be paid into the partnership account, and that no member of said firm should engage in the business of buying and selling real estate in the said District on his own account, or with any other person or persons, except in cases where the proposed transaction had been explained to the said firm, and

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the firm had declined to take any part therein," was also positively denied by the answer of the appellant under oath. There is no testimony in the cause to overcome that denial. On the contrary, the evidence establishes that there was no such restriction or limitation imposed upon the individual members. So that the complainants were entitled to no relief on that ground.

But aside from the foregoing questions of fact, how stands the case on the assumption that there was a new stipulation or agreement when Olmstead was taken into the firm, (as claimed by Kilbourn and Olmstead, and as set out above,) that knowledge and information obtained by any member of the firm as to bargains in real estate should be first communicated to the firm, with the view of giving the firm, or the members thereof, the first opportunity of purchasing, before any individual member thereof could act upon such knowledge or information for his own benefit? Can the agreement to furnish information as to bargains in real estate and give copartners the option of taking benefit of such bargains, be considered as so enlarging the scope of the partnership business as to include therein the purchase and sale of real estate on joint account? It would be a perversion of language and a confusion of ideas to treat such a stipulation, if it were clearly established, as creating a partnership in future options to buy what did not already, by the terms of the copartnership, come within the scope and character of the partnership business. That alleged stipulation, instead of enlarging the partnership business, was manifestly a restriction and limitation upon the power and authority of the copartners to bind the firm, or the members thereof, in any real estate transaction, until each member had expressly consented or agreed to join in the particular purchase, specially submitted for consideration.

By the well-settled law of partnership each member of the firm is both a principal and an agent to represent and bind the firm and his associate partners in dealings and transactions within the scope of the copartnership. No express authority is necessary to confer this agency or fiduciary relation in respect to the business of the firm. If the buying and selling

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of real estate was a part of the business of Kilbourn & Latta, the alleged stipulation about giving an option to the firm and the members thereof to accept special bargains would have been an idle arrangement. But under the alleged stipulation each and every purchase of real estate was a special and individual transaction or enterprise, requiring the special assent and agreement of each partner thereto, before it became a subject of partnership, or was brought within the scope of the partnership business. Under the operation of the agreement, a partner who purchased real estate, either on joint or partnership account, did so not under or by virtue of the partnership articles, or under authority derived from the partnership business and his implied agency to represent the firm therein, but solely and exclusively from the special assent or agreement of his associates to engage in that particular purchase. So that each parcel of real estate to be acquired, as well as the agreement to purchase the same, was first made the subject of a special arrangement. It is difficult to understand how, under such circumstances and conditions, a copartnership could properly be said to include or extend to the business of purchasing and selling real estate.

The special subject of each purchase, as admitted by Kilbourn, — like the purchase of bonds and other securities, — did not and could not come within the operation of the copartnership, or become a part of the partnership agreement, until each particular piece of property had been selected and agreed upon. It is undoubtedly true that, under this alleged agreement, if a partner had submitted to the firm or his associates the question of buying a particular parcel of land, and they had agreed to make that purchase, he would thereafter have occupied an agency or fiduciary relation in respect to that particular piece of property. But the question here is whether his failure to give the firm, or his copartners, the opportunity of making an election to buy certain real estate, and his making the purchase thereof for his own account, or jointly with another, is such a violation of his fiduciary relations to the firm and his associates in respect to copartnership business as to entitle the latter to call him to account for profits real-

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ized in such transactions. In other words, will the violation of his undertaking to give to the firm, or his associates, the opportunity or option to engage in any particular transaction, not within the scope of the firm's business, entitle the copartners to convert him into a constructive trustee in respect to the profits realized therefrom?

That the members of the firm, prior to 1871, or after that date, by special agreement, made purchases of particular parcels of real estate on speculation or for investment, did not make such speculative transactions a part of the partnership business so as to invest either partner with the implied authority to engage therein on account of the firm. The name of the firm was never, in fact, used in such special ventures, which no partner had authority to enter into except, and until, the consent of the others had been specifically obtained so to do — each instance of buying on firm or joint account being the subject of a separate, special, and distinct agreement.

It may be said of any and every partnership, irrespective of its regular business, that by consent of all the members, other matters beyond the scope of the partnership may become the subject of investment or speculation on joint account, but such special transactions cannot properly be said to come within the scope of the partnership. The very fact that the express consent of each partner was required in order to engage in such special ventures goes clearly to show that the transactions were not within the scope of the partnership, for, if they were, special consent could not be required as a condition precedent for engaging therein.

Matters within the scope of the partnership are regulated and controlled by a majority of the partners, but by the alleged stipulation under consideration a single member of the firm could control the firm's action in respect to purchases of real estate. This is inconsistent with the idea that the business of the firm extended to such purchases.

Again, the alleged agreement does not provide how such future acquisitions as might be specially selected or agreed upon for speculation or for investment were to be paid for, or in what proportion the several partners should be interested

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therein. Neither does it distinctly appear from the allegations of the bill, nor from the testimony of the appellees, whether, in acting upon information given, the special purchases were to be made for the account of the partnership or for the account of the several members of the firm. The methods of keeping the accounts of such transactions in the name of the individual members rather than in the name of the firm would indicate that such purchases were for the benefit of the separate partners rather than for the firm.

There is no allegation in the bill, nor any direct statement in the testimony of the appellees, that if the information had been given as to the Stearns' transactions, either the firm or themselves would have exercised the option of engaging therein upon the conditions of allowing Stearns to determine "when, at what price, and on what terms any portion of the real estate might be sold." Neither is it alleged in the bill, nor shown by the proofs, that the appellant in any way neglected the partnership business, nor that the firm and his copartners sustained any damage whatever from the transactions. On the contrary, it is shown that from the purchases and sales of the property bought on joint account with Stearns the firm derived its regular commissions.

This alleged new stipulation amounts, if it has any legal force and operation, simply to an agreement for a future partnership, or the joint acquisition of such special properties as might by mutual and unanimous consent be considered as holding out a prospect of profitable speculation; and at most could only be regarded as an agreement for a future partnership in respect to such properties as might be specially selected for speculation. It is well settled in such cases that no partnership takes place until the contemplated event actually occurs. It stands upon the same principle as an option to become a partner, which creates no partnership until the option is actually exercised.

If the stipulation in question could be construed into an agreement that no partner should engage in the buying and selling of real estate on his own account, would that entitle the other members of the firm to share in the profits that

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Latta made in real estate speculations without having first secured the consent of his copartners to his engaging therein? No such proposition can be sustained.

In *Murrell* v. *Murrell*, 33 La. Ann. 1233, it was held that a partner who, in violation of the act of partnership, enters into another firm, does not thereby give the right to his original copartner to claim a share in the profits of the new firm. The violation of the agreement may give rise to an action for damages, but inasmuch as the original copartner could not be held, without his consent, for the debts of the new firm, he cannot claim to be made a partner therein.

In *Dean* v. *McDowell*, 8 Ch. D. 345, one of the stipulations in the articles of copartnership was that "said C. A. McDowell should diligently and faithfully employ himself in and about the business of the partnership, and carry on and conduct the same to the greatest advantage of the partnership," and by another article it was stipulated that neither partner should "either alone or with another person, either directly or indirectly, engage in any trade or business except upon the account and for the benefit of the partnership." The business of the firm was to deal as merchants and brokers in selling the produce of salt works on commission, and during its existence McDowell clandestinely purchased a share in a firm of salt manufacturers. A bill was filed by the other partner for an account of the profits realized in the new business, and it was held by the master of the rolls that the bill could not be sustained. On appeal this judgment was affirmed. Lord Justice James, after stating the general principles of partnership law, said: "The business which the defendant has entered into was that of manufacturing salt, which was to be the subject-matter of the trade of the first firm. If in that he had in any way deprived the firm of any profits they otherwise would have made — if by his joining in the partnership for the manufacture he had diverted the goods from the firm in which he was a partner to some other firm, I can see that that would be a breach of his duty; but it is not pretended or alleged that any alteration took place in the business of the firm by reason of his having become a share-

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holder in the other business. It is not pretended that there was any alteration in the commission or anything else. Everything remained exactly as it was, so that it cannot be suggested that there was a farthing's worth of actual damage done to the original firm by reason of his having become a shareholder in the works which produced the thing in which the firm traded. Under these circumstances it seems to me that we cannot say his profit from the new business was a benefit arising out of his partnership with the plaintiffs. It was not a benefit derived from his connection with the partnership, or a benefit in respect of which he was in a fiduciary relation to the partnership. His relation to the partnership in this respect was the same as an ordinary covenantor to a covenantee in respect of any other covenant which is broken. It was a covenant by a partner with a copartner, a covenant that he would not do something which might result in damage. But it was not a covenant, in my view, which was in any way connected with the fiduciary relations between the parties. That being so, it seems to me that the Master of the Rolls was right in saying that you cannot extend the cases with regard to a share in the profits to a case in which, as between the parties, there really was nothing but a breach of covenant, which in truth did not result, and could not have resulted, in the slightest loss to the partnership, unless it could have been shown that it led to the covenantor neglecting the business of the partnership, and devoting himself to other business, and diverting his time and attention from the business to which it was his duty to attend." These views, which were concurred in by the other members of the court, are directly in point in the present case, which, in principle, cannot be distinguished from the case there under consideration.

We are clearly of opinion that the alleged new stipulation that each copartner should furnish to the firm, or to the members thereof, information as to bargains in real estate, and give it or them the option to engage in the acquisition thereof before acting upon such information for his own benefit, neither enlarged the scope of the partnership so as to make it include the purchases and sales of real estate, nor precluded

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any member of the firm from making purchases on his own account or jointly with others; and that the act of the appellant in purchasing property with Stearns was not such a violation of his duty and obligation to the firm of Kilbourn & Latta, or to the members thereof, as to entitle the appellees to share in the profits which he realized therefrom.

In respect to the second ground, on which the court below rested its judgment, that the appellant could not take advantage of the skill, knowledge, and information as to the real estate market acquired in the course of his connection with the partnership of Kilbourn & Latta so as to gain any profit individually therefrom, but was bound to share with his copartners all the beneficial results which could be derived from his knowledge or information on that subject, we need not do more than to say that this proposition is wholly unsupported either by the authorities or by any legal principle applicable to partnership law.

It is well settled that a partner may traffic outside of the scope of the firm's business for his own benefit and advantage, and without going into the authorities it is sufficient to cite the thoroughly considered case of *Aas* v. *Benham*, 2 Ch. D. 1891, 244, 255, in which it was sought to make one partner accountable for profits realized from another business, on the ground that he availed himself of information obtained by him in the course of his partnership business, or by reason of his connection with the firm, to secure individual advantage in the new enterprise. It was there laid down by Lord Justice Lindley that if a member of a partnership firm avails himself of information obtained by him in the course of the transaction of the partnership business, or by reason of his connection with the firm, *for any purpose within the scope of the partnership business, or for any purpose which would compete with the partnership business, he is liable to account to the firm for any benefit he may have obtained from the use of such information; but if he uses the information for purposes which are wholly without the scope of the partnership business, and not competing with it, the firm is not entitled to an account of such benefits.*

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It was further laid down in that case, in explanation of what was said by Lord Justice Cotton in *Dean* v. *McDowell*, *ubi supra*, that "it is not the source of the information, but the use to which it is applied, which is important in such matters. To hold that a partner can never derive any personal benefits from information which he obtains as a partner would be manifestly absurd;" and it was said by Lord Justice Bowen that the character of information acquired from the partnership transaction, or from connection with the firm, which the partner might not use for his private advantage, is such information as belongs to the partnership in the sense of property which is valuable to the partnership, and in which it has a vested right.

Tested by these principles, it cannot be properly said that Latta used any information which was partnership property so as to render him chargeable with the profits made therefrom. His knowledge of the real estate market, or in respect to profitable investments therein, was not used in competition with the business of the firm, nor in any manner so as to come within the scope of the firm's business.

The points already considered being sufficient to dispose of the case, we do not deem it necessary to go into the other question discussed as to whether a parol partnership, in respect to purchasing and selling real estate, or an agreement between copartners to give each other the option of engaging in such purchases, would come within the operation of the statute of frauds.

We are clearly of opinion, upon the whole case, that the decree should be

Reversed, and the cause remanded to the court below with directions to dismiss the bill at the cost of the appellees.

Mr. Justice Harlan did not hear the argument and took no part in the consideration or decision of this case.

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ALLEN v. UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

No. 969. Submitted November 16, 1893. — Decided December 4, 1893.

A Statute of Arkansas, Digest of 1884, 425, c. 45, § 1498, provides that "an infant under twelve years of age shall not be found guilty of any crime or misdemeanor." The courts of that State have held, *Dove* v. *State*, 37 Arkansas, 261, that the common law presumption that a person between the ages of twelve and fourteen is incapable of discerning good from evil, until the contrary be affirmatively shown, still prevails. A homicide was committed in May. A young person, charged with the commission of it, testified on his trial in the Circuit Court for the Western District of Arkansas, in the following February, that he would be fifteen years old the coming March. The court charged the jury that the *prima facie* presumption as to lack of accountability terminated at eleven years of age. *Held*, that, although the accused by his testimony had shown that he had passed the age of fourteen when the crime was committed, yet, as the mistake might have prejudiced him with the jury, it was error.

To direct the attention of the jury to the contemplation of the philosophy of the mental operations, upon which justification, or excuse, or mitigation in the taking of human life may be predicated, is to hazard the substitution of abstract conceptions for the actual facts of the particular case, as they appeared to the defendant at the time.

When the defence, in a case of homicide, is justification, or excuse, or action in hot blood, the question is one of fact which must be passed upon by the jury in view of all the circumstances developed in evidence, uninfluenced by metaphysical considerations proceeding from the court.

The question whether the defendant in a capital case exceeded the limits of self-defence, or whether he acted in the heat of passion, is not to be determined by the deliberation with which a judge expounds the law to a jury, or with which a jury determines the facts, or with which judgment is entered and carried into execution.

Alexander Allen was indicted at the November term, 1892, of the Circuit Court for the Western District of Arkansas for the murder of Phillip Henson in the Cherokee Nation, on May 14, 1892, and, at the February term, 1893, of that court was tried upon the indictment, found guilty of the crime charged,

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and, after the overruling of a motion for new trial, was sentenced to death. A writ of error was then allowed to this court.

The evidence tended to show that Allen was a colored boy, of about fourteen years of age at the time of the homicide, working on the farm of Albert Marks in the Cherokee Nation, some three or four miles from Coffeyville, Kansas, where Marks lived; that on Thursday, May 12, 1892, he was sent to look for some horses belonging to one Morgan, and was accompanied by another colored boy, James Marks, who was then twelve years old; that these boys met Phillip Henson, the deceased, a white boy, eighteen years of age, with whom were George Erne, aged fourteen, and Willie Erne, aged thirteen, also white, and some words ensued between Henson and Allen. In respect of this, the Erne boys testified to nothing of particular moment, but the accused and James Marks testified to great bitterness in the language used by Henson, including threats and oaths. On Saturday, May 14, Henson and the two Erne boys had left the Erne house and were going through a wheat field toward a lake in an easterly direction, carrying in their hands willow sticks with the bark peeled off, with which to kill frogs to use as bait in fishing, and when about half way across the field they saw on the eastern side of the fence which separated it from the land of Albert Marks, Allen, and Harvey Marks, a brother of James, then eleven years of age. An altercation ensued, in which Allen shot Henson with a pistol, from which wound he died in a few minutes. According to the evidence of the Erne boys, Allen took the pistol out of his hip pocket, removed the scabbard, handed it to Harvey Marks, and climbed through the wire fence from the east side to the west side, struck Henson with his left hand, and then with the pistol in his right hand shot Henson twice and shot George Erne through the arm. Allen and Harvey Marks testified that Henson and his two comrades came through the fence on the west side into Marks' ground, and Henson struck Allen over the head with a stick; that Henson and Allen closed in and wrestled, and Henson threw Allen and had him down, and George Erne then struck Allen on the arm with a

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stick; that Allen, while lying on the ground with Henson on him, drew the pistol from his pocket and shot Henson, who, after he was shot, ran towards the fence, about forty steps off, and climbed through it back into the wheat field. His dead body was found lying in the field about thirty or thirty-five steps from the fence. The face seemed bruised, as if he had been struck in the mouth. Evidence was given that the tracks of the three boys were plain and distinct the next day in the soft ground, going in a northeasterly direction in the field towards the lake, and that the wheat was trampled down, and there was blood on the ground at the distance of thirty-eight steps from the fence; that from this point to the fence there was a single track made by shod feet coming over the fence westward, while the other three tracks were made by bare feet; and that Henson and the two Erne boys were barefooted on that occasion, while Allen had on either boots or shoes; that there was short grass on the east side of the fence, and although there were tracks around there it was difficult to discover anything. There was also evidence that Allen, after the shooting, ran back to the house, obtained his satchel, went to Coffeyville in a cart, and thence on foot to Edna, Kansas; that Clifford, the United States marshal for the District of Kansas, and one Knotts found him at Edna about half-past two that day; that he fled, and they pursued and caught him; that Knotts returned with him to Coffeyville, and on the way asked him if he knew that he had killed that boy, and he said, No, that he knew he shot him, but not that he killed him; and then stated that there was a man shot in Oswego, and that nothing was done with him; and being asked what he shot the boy for, he replied he was afraid they would hurt him with their sticks; that they did not strike him with sticks, but he was afraid they would; that they had had trouble a few days before. It further appeared that he told Clifford he "didn't propose to be beaten with clubs;" that the deceased struck him over the arm; and that Clifford examined his person on the 16th and found a bruise on his left arm. The evidence further tended to show that on the morning of the 14th of May, Allen did not have his pistol with him, but, having started with a load of

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hay to town, met Harvey Marks coming down to the farm for milk, and was told by William Marks (Harvey's grandfather) to go back with Harvey, which he did, and then went into the farmhouse and took the pistol from his overcoat pocket, where he had placed it two days before. This pistol was found in his satchel when he was arrested, and was a six-shooter with a rubber scabbard on it and one load in it. Three empty cartridge shells, which fitted the pistol, were found in his pocket, and Allen, when asked by Clifford to account for the empty shells, stated that he had emptied his pistol shooting rabbits on his way out there from Coffeyville. When asked on the stand why, when he went to Coffeyville, he had not gone and seen Albert Marks about the matter, and told him what had occurred, or hunted up Mr. Morgan, Allen replied, because he did not think it was worth while; "It wasn't my business, because I had done it, to go around and tell every one about it." James and Harvey Marks were cross-examined to show that there were discrepancies between their statements on the witness stand and statements which they had made to the marshal May 21, and which were taken down in writing by him at the time.

The court in the course of the charge to the jury stated that it was necessary that he should give "the legal definition of all these conditions that I have named, that is, murder, manslaughter, and a rightful killing under the law of self-defence, called a killing in self-defence;" and after defining murder and explaining malice, express and implied, and giving the definition of manslaughter, with comments, all at length, proceeded thus:

"Now, in this connection, if you believe, at the time of this killing, Hanson and these other boys had entered into a fight, had come up and attacked the defendant with sticks, as is claimed by him, and as is claimed by some of these other witnesses, and that he killed him at that time, and under such circumstances, if it was not done in a brutal and unnatural and specially wicked way, that would be a state of case where manslaughter would exist, provided the defendant by his actions of a violent character and his conduct did

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not bring on the conflict of that kind. If he brought it on, if he precipitated it by a violent act upon his part, then there could be no mitigation in it; there could be no self-defence, as I will tell you presently. But if, on the other hand, he went up and put his pistol across that fence, and jumped over the fence, and attacked the Hanson boy, struck him in the mouth, and at the same time attempted to shoot him, and subsequently in the consummation of that attempt did shoot him, and followed up that shooting when he was retreating and shot him in the back, that would be a state of case where there would be no manslaughter in it; it would be murder under the definition of that crime as I have given it to you.

"We come now to the other definition. It has been invoked in this case. And I give it in these cases whether it has been invoked or not, because we can frequently reason and come to a conclusion by means of elimination, just as in algebra, you can eliminate certain quantities from a certain side of an equation, and thus get at a certain quantity, and get at a methodical conclusion in a reasonable way in that manner. Now, if we have the definition of these three conditions, and if you can eliminate two of them, you necessarily drop down to the other condition as existing, because there cannot be but one which is true. The conditions are the opposite to each other, and you cannot find the existence of any two of them in a case. There is one certain condition that is applicable to the facts. Therefore, when you have these conditions all before you, you can the better say whether it is murder or manslaughter, or a case of justifiable homicide. [Now, what is justifiable homicide? When can a man slay another? When can he sit as a judge passing upon the law, and a jury passing on the facts, and then as a jury applying the law to those facts, and finding a verdict, and then acting again as the court and entering up judgment, and then going out as a marshal or sheriff and executing that judgment, all at the same time — determining the law, determining the facts as judge, jury, and executioner all at the same time? This is a mighty power in the hands of the citizen. It is a mighty power, yet it is to be applied when

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it belongs to him because it is the law of necessity, and it is given to him because it is the law of necessity; it is given to him because at the time he executes it in a deadly way his own life is either actually or really in deadly peril from which he cannot escape, except by the use of that deadly means, or, in your judgment, taking into consideration his condition, there was reasonable ground to believe there was peril. That is what is meant by it. It is a law of protection; it is a law of necessity. This is the law you are sitting here to execute. It is a law of self-defence. You are to execute it for the sake of society, for the protection of the members of society against the acts of violence of the wicked, which would destroy their rights to their property, jeopardize their liberties and destroy their lives. It is all a law of self-defence. The necessity is so great, in contemplation of the law, that the individual can take human life. Now, I will give you this principle of the law as defined by the leading court in this country, and a definition that has never been shaken by any court, and it is stated in very brief language, but there is a great deal in it. There are two propositions; one is a case where the danger to life is actual, is real, at the time of the killing, and that the party cannot escape from it by the exercise of reasonable means, and he therefore, to save his own life, may act, and act to the extent of taking life. I read to you that first proposition, and it is this: 'A man who is in the lawful pursuit of his business' — that means he is doing what he has a right to do, he is doing no wrong, and when in that condition 'he is attacked by another, under circumstances which denote an intention to take away his life or to do him some enormous bodily harm, he may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power.' He is doing what he had a right to do, and when so situated he is attacked by another in such a way as to indicate from the nature of the attack a purpose to take away his life; not that he is assaulted in a slight way; you could not kill him for that;

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the law of self-defence is a law of proportions as well as a law of necessity, and it is only danger that is deadly in its character that you can exercise a deadly act against. He is attacked by another in such a way as to denote a purpose to take away his life, or to do him some great bodily harm, from which death may follow, and in such a case he may lawfully kill the assailant, when, provided he use all the means in his power otherwise to save his own life or to prevent the intended harm, such as retreating as far as he can or disabling him without killing him, if he be in his power. The act coming from the assailant must be a deadly act under this proposition. It must be an act that is hurled against him, and that he has not created it, or created the necessity for it, and it must be an act of which he cannot avoid the consequences; if he can, he must avoid them; he must get out of the way of the act if he can, rather than take upon himself the responsibility of taking a human life.]

"Now, the other proposition is a case where the danger may not really exist at all; it may not have any existence, but there must be at the time he takes life that which would satisfy a reasonable man, situated as was the defendant, that it did not then and there exist, and a man may act upon its appearance; but there must be an appearance. A man cannot act upon bare suspicion of his own mind; he cannot contemplate a state of case that does not exist. If he has that confronting him which would lead a reasonable man, situated as he was, to the belief that there was deadly danger, he could act upon that condition, and he may kill, provided he cannot avoid what seems to be real danger."

To the giving of that part of the charge included in brackets in the foregoing the defendant at the time excepted.

The court also charged the jury as follows: "Now, a word as to the accountability of this defendant. The law says that when a child between the years of seven and eleven commits a crime he is, presumably, not held accountable, yet this presumption may be overcome by proof; but from eleven years up the law contemplates that he is accountable for his criminal acts; that he is said to be conscious of right and wrong so as

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to be held responsible by the law, and to take away that condition it requires the production of proof showing the lack of accountability. In legal contemplation, from eleven years upwards he is accountable." To the giving of this part of the charge the defendant at the time excepted.

An exception was also taken to certain comments of the court in reference to the testimony of the defendant.

Errors were assigned upon the exceptions so taken.

Mr. A. H. Garland for plaintiff in error.

Mr. Assistant Attorney General Conrad for defendant in error.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

The rule of the common law was that one under the age of seven years could not be guilty of felony or punished for any capital offence, for within that age the infant was conclusively presumed to be incapable of committing the crime; and that while between the ages of seven and fourteen the same presumption obtained, it was only *prima facie* and rebuttable. The maxim — malice supplies the want of maturity of years — was then applied and, upon satisfactory evidence of capacity, the child within these ages might be punished; but no presumption existed in favor of the accused when above fourteen.

The age of irresponsibility has been changed in many of the States by statute, and among others, in Arkansas, where it is provided that "An infant under twelve years of age shall not be found guilty of any crime or misdemeanor," Ark. Stat. Dig. 1884, 425, c. 45, § 1498, it being held, however, that the common law presumption that a person between the ages of twelve and fourteen is incapable of discerning good from evil, until the contrary is affirmatively shown, still prevails. *Dove* v. *State*, 37 Arkansas, 261.

In the case at bar, the defendant testified on the trial, February 13, 1893, that he would be fifteen years old the coming March, and, if this were so, he was fourteen in March, 1892,

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and, as the homicide was committed on May 14 of that year, he was at that time some two months older than fourteen years. There seems to have been no controversy over his age, and as to whether his appearance was that of a boy less than fourteen, we have, of course, no means of knowledge. The court was not, so far as this record shows, requested to charge in reference to the age of accountability, and it may be, as suggested, that the matter was adverted to out of consideration for the accused, because immediately after the statement on this subject the learned judge goes on to say that defendant could not be found guilty of any crime unless the jury were satisfied from the whole of the testimony and from the law given to them "that the state of the case which makes the crime is established beyond a reasonable doubt." But this he was bound to charge in any aspect, and the difficulty here is that through some inadvertence the *prima facie* presumption as to lack of accountability was declared to terminate at eleven years instead of fourteen. And while it is properly argued by counsel for the government that this was not an error injurious to the defendant, because on his own statement he had passed the age of fourteen, yet we are not altogether satisfied that the result was not prejudicial. Where the question is whether the homicide was or was not done with malice, wrongfully, intentionally, and without just cause or excuse, it would seem proper that the attention of the jury should be called to the youthfulness of the offender, if the circumstances rendered that fact significant; and since in this case the presumption of the lack of accountability had obtained until within two months of the homicide, if the defendant's own statement as to his age is to be accepted, an instruction which treated him as having been under the weight of full accountability three years longer than was the fact, may have tended to weaken the effect upon the minds of the jurors which his youth might have otherwise had, and to which the humanity of the law regards him as entitled. The burden of proving legal capacity, as of other facts necessary to make out the defendant's guilt, was upon the government; and although the presumption from the defendant's age may have been such as

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to sustain that burden, yet, as the court charged in relation to the age of accountability, we are not persuaded that the consequences of want of accuracy ought to be assumed to have been harmless.

We do not care, however, to dispose of the case upon this ground, as another and more serious exception was saved. The contention on the part of the accused was that there was no premeditation on his part; that he was engaged in a fight in which he was struck and thrown down, and, in the heat of the struggle, committed the homicide; that he was entitled to make the defence of excusable homicide, and was guilty at the worst of only manslaughter in unlawfully and wilfully shooting, but without malice. The court deemed it its duty to charge upon the question of justifiable homicide, and in doing so to consider and explain two propositions, one where the danger to life was actual at the time of the killing and the party could not escape from that danger by the exercise of reasonable means, and the other, where the danger might not have really existed at all, but where the appearance of danger was such as would induce a reasonable man to believe that the danger existed. But these two propositions were accompanied by certain observations which form the subject of the exception under consideration. The court said:

"Now, what is justifiable homicide? When can a man slay another? When can he sit as a judge passing upon the law, and a jury passing on the facts, and then as a jury applying the law to those facts, and finding a verdict, and then acting again as a court and entering up judgment, and then going out as a marshal or sheriff and executing that judgment, all at the same time, determining the law, determining the facts, as a judge, jury, and executioner all at the same time? This is a mighty power in the hands of the citizen. It is a mighty power, yet it is to be applied when it belongs to him because it is the law of necessity, and it is given to him because it is the law of necessity; it is given to him because at the time he executes it in a deadly way his own life is either actually or really in deadly peril from which he cannot escape except by the use of that deadly means, or, in your judgment, taking

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into consideration his condition, there was reasonable ground to believe there was peril."

It will be perceived that the jury are thus told that he who contends that he slew another to protect his own life from deadly peril, or because he believed his life in immediate danger, must be regarded as exercising the deliberation of a judge in passing upon the law and of a jury in passing upon the facts, in arriving at a determination as to the existence of the danger and the necessity of using the particular means to avert it, and, having arrived at the conclusion that the taking of life is required, as proceeding to do so as an officer does who is charged by law with the execution of that solemn duty. And inasmuch as the question in such cases frequently is, not only whether there was actually imminent peril to the slayer's life, but whether he entertained an honest belief to that effect upon reasonable grounds, and also whether the killing was in hot blood and attributable to the infirmity of human nature rather than to malice aforethought, the views announced by the learned judge would be applicable to manslaughter as well as excusable homicide, the distinction between which is often extremely close.

In this we are of opinion there was error. To direct the attention of the jury to the contemplation of the philosophy of the mental operations, upon which justification or excuse or mitigation in the taking of human life may be predicated, is to hazard the substitution of abstract conceptions for the actual facts of the particular case as they appeared to the defendant at the time.

While it may be psychologically true that in every sane act, with whatever swiftness performed, there is involved the prior determination to do it, often inappreciably separated in time; yet when the defence in a case of homicide is justification or excuse or action in hot blood, the question is one of fact and must be passed on by the jury in view of all the circumstances developed in evidence, uninfluenced by metaphysical considerations proceeding from the court. In view of such considerations a verdict might be reached in harmony with the results of scholastic reasoning upon the nature of things in general

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apart from the subject-matter, and yet be unjustified by the case in the concrete which the jury were impanelled to try.

We do not think that the doctrine is practicable which tests the question whether a defendant exceeded the limits of self-defence or acted in the heat of passion by the deliberation with which a judge expounds the law to a jury or a jury determines the facts, or with which judgment is entered and carried into execution.

This exception is fatal to the verdict, and the judgment must be

Reversed and the cause remanded with a direction to grant a new trial.

MR. JUSTICE BREWER, with whom concurred MR. JUSTICE BROWN, dissenting.

I am unable to concur in the conclusions of the court in this case, and will state briefly the grounds of my dissent. From the testimony, an outline of which is given in the opinion, it is evident that if the testimony of the two Erne boys as to the circumstances of the homicide is to be believed, the defendant was guilty of a wilful and deliberate murder; if that of the defendant and the two Marks boys is the truth, then the homicide was probably only manslaughter. That it was this at least is practically conceded. His own counsel say: "We believe, from a full review of this record, that the defendant should have been found guilty of manslaughter; that is the most of which he is guilty." That the testimony of the Erne boys was to be believed rather than that of the defendant is made certain by the testimony of the disinterested parties who examined the ground where the homicide took place, and whose testimony as to the condition of the ground where the body of the deceased was found, and the tracks from that place to the fence, render it morally certain that no such transaction could have taken place as the defendant testified to, and that his testimony, and that of the Marks boys, was false. Of course, we have not here to pass upon this conflicting testimony. I only notice it that it may be seen that the case did

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not turn upon any question of the accountability of the defendant; that if the testimony of the Erne boys is to be believed, the homicide was wilful and deliberate, and in revenge for some opprobrious epithets that had been cast upon him two days theretofore by the deceased. There was nothing in the transaction, whether it took place as testified to by the Erne boys or by the defendant and the Marks boys, to suggest any question of the want of accountability. The conduct of the defendant was like that of any other criminal; arming himself with a pistol, going to meet a party against whom he has malice, shooting and killing him, and then endeavoring to make his escape. Strike from the case the testimony as to age, and there is nothing in the story of the homicide, whether as told by the witnesses for the prosecution or those of the defendant, which suggests either youth, immaturity, or mental unsoundness. How can it be that there was any prejudicial error in charging the jury that the age at which accountability was presumed commenced at eleven rather than at fourteen? By his own testimony he was past fourteen. He was thus presumably accountable. If the court had made no reference to the matter, confessedly there would have been no error, and a mistake in the date of the time when accountability commences certainly cannot be vital when it is admitted that accountability existed. Suppose, in a case not capital, the court had instructed that the statute of limitations was ten instead of, as is the fact, three years, and the testimony showed beyond any dispute — the defendant himself admitting it — that the transaction had taken place within the prior year, could it be said that there was error working prejudice to the substantial rights of the defendant and calling for a reversal of the judgment? Yet that is precisely this case. Did this mistake in reference to this irrelevant matter lead the jury to give more credence to the testimony of the Erne boys; to disbelieve the story told by the defendant and his associates? Did it strengthen the testimony of the disinterested parties as to the condition in which they found the place of the homicide and the tracks between that and the fence? Did it in any way change the character of the transaction as presented to

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the consideration of the jury? Clearly not, but this court seems to think that the defendant may have looked boyish, and been immature, and that this fact should have been called to the attention of the jury. Yet, if it were true, the jury saw and knew it. So far as the record throws any light upon his appearance, it makes against the idea of boyishness and immaturity. The deceased was a boy eighteen years of age, and his father testifies that the defendant was about his height and much heavier, although he admits that his own boy was short of stature. When he was arrested by the marshal, the latter accosted him thus: "Here, young man, I want you." Of course, this testimony amounts to but little, but so far as it goes it makes against the idea that one who was in appearance and in fact a mere boy was being tried for crime, whose enormity he did not comprehend, and for which he was not fully accountable. It tends to strengthen that which the testimony of the prosecution, evidently entitled to credence, discloses, to wit, deliberate action by one who knew fully what he was about and who was fully responsible therefor. His counsel asked no instruction in respect to his youth or immaturity, and the general rule is that if a party asks no instructions upon a given matter it cannot be held that the court erred in giving none thereon. It seems to me strange to assume that, (while the jury saw the defendant, saw how mature he was, and we only guess at it,) he may have been a mere boy in fact and appearance; that the court should have given an instruction in respect thereto, though none was asked; and that, while he admits that he had arrived at an age of accountability, a mistake in the charge of the court as to the time at which accountability commences is sufficient to work a reversal of the judgment.

With reference to the other matter, which, in the judgment of the court, requires a reversal, it is only another and forcible illustration of that disregard of our rules and the general practice of appellate courts in regard to bills of exception, which I had occasion to comment upon in the opinion I have just filed in the case of *Hicks* v. *United States*, *ante*, 442, 453. Here is over a page of the court's charge which is challenged

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by a general exception without any specification of the matter of law which is objected to. Singularly enough, the matter of law which is the substantial feature of this challenged portion of the charge is not deemed erroneous, is not noticed by this court, but the error which is found is in language of mere illustration in an introductory question. That matter is the law of self-defence, the right to take the life of an assailant to preserve one's own life. And the law stated is that when there is real danger the party assailed may take the life of his assailant. No question is made but that this matter of law was stated correctly. It is, however, held that an error was committed in a question which led up to this statement of the rule of law. The court asks, "When can a man slay another? When can he sit as a judge passing upon the law and a jury passing on the facts, and then as a jury applying the law to those facts and finding a verdict, and then acting again as the court and entering up judgment, and then going out as a marshal or sheriff and executing that judgment, all at the same time — determining the law, determining the facts as judge, jury, and executioner all at the same time?" and because of this question, stated as a preliminary to the laying down of the rule of law, the judgment is set aside. There is in this no charge that there must be a period of long deliberation, such as that which sometimes characterizes proceedings in a court of justice. On the contrary, the plain implication is of speed, for the language is "determining the law, determining the facts as judge, jury, and executioner all at the same time." An instantaneous act. It is psychologically true that a party in exercising the right of self-defence determines what the law is which gives him a right to act, and whether the case before him is within that law, and thus is judge and jury, and then, as marshal or sheriff, carries that determination into immediate execution. It may be conceded that the mental action may be rapid, instantaneous, as it were; that there may be no distinct separation in the thought of the party as to the respective functions of judge and jury, no formal presentation of the law of self-defence with all its limitations; yet of necessity he determines that the situation before him is one which under

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the law, as he understands it, gives him a right to take the life of his assailant. He is judge, jury, and sheriff. Indeed, this is not denied, but it is thought that the language used by the court is too metaphysical. In other words, the court has stated what is strictly and accurately true. Yet, because it is abstract and metaphysical, this court will presume that the jury did not understand and might be misled by it. When did it become a rule of law that a court of error should presume that the jury in a trial court were ignorant? When before was it ever heard that a verdict was to be set aside by an appellate court on the ground that a juror may have been misled by an instruction of the trial court, when that instruction it is conceded is strictly accurate and applicable to the case?

For these reasons I dissent, and I am authorized to say that Mr. Justice Brown concurs with me in this dissent.

MULLETT'S ADMINISTRATRIX *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 121. Argued November 28, 1893. — Decided December 11, 1893.

The Supervising Architect of the Treasury is not entitled to extra compensation, above his salary, for planning and supervising the erection of a department building in Washington, occupied by other departments of the government.

In this case the delay in bringing suit leads to the conclusion that the architect recognized the work for which he sued as within the scope of his regular duties.

On May 4, 1889, Alfred B. Mullett filed his petition in the Court of Claims, seeking to recover for services as an architect rendered in the year 1871, in preparing designs for the building now occupied by the State, War, and Navy Departments, and working drawings for the construction of the same. Other claims were stated in the petition, but they have since been

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abandoned by the petitioner. On June 2, 1890, the Court of Claims made its findings of fact, as follows:

"I. The commission authorized by the resolution of December 14, 1869, and of which plaintiff, then Supervising Architect of the Treasury, was a member, decided to erect a building for the Department of State upon McPherson Square, in the city of Washington. It was suggested that plaintiff prepare plans for the building proposed, but he declined, and tentative plans were prepared by another. These plans were not satisfactory. Plaintiff thereupon, at the suggestion of the Assistant Secretary of State, prepared tentative plans for the building then intended to be erected upon McPherson Square for the Department of State only.

"Later it was decided to erect at the corner of Pennsylvania Avenue and Seventeenth Street, Washington, a building to accommodate the Departments of State, War, and Navy, and the McPherson Square site for the Department of State was abandoned. This course was authorized by the act of March 3, 1871, and prior to the passage of this act plaintiff was requested by the Secretary of State to extend his former design so it would cover the larger building then contemplated. This he did.

"II. After the passage of the act of March 3, 1871, 16 St. 494, c. 113, the commissioners therein named selected the plaintiff as architect to design and prepare the drawings for the building contemplated by that act. Plaintiff designed these drawings, superintended their preparation, made and suggested changes therein, and the drawings so designed by him were accepted and approved by the commissioners designated in the said act, and the building now occupied by the Departments of State, of War, and of the Navy was built in a substantial accordance with the drawings. Plaintiff superintended the construction of the southern wing of this building, now occupied by the Department of State, and the east wing from the beginning, until January 1, 1875, at which date the expenditures upon the building amounted to $3,876,096.47. The total cost of the entire building was $10,030,028.99.

"III. Plaintiff during all the time covered by the service

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Counsel for Appellant.

hereinbefore described was Supervising Architect of the Treasury Department. The labor performed by him as to the new building was done by permission of the Secretary of the Treasury, without sacrifice of time properly to be devoted to the duties of the supervising architect, and without promise of compensation, except as hereinafter shown. Plaintiff was not at personal expense or outlay in the preparation of plans or otherwise in connection with the new building, but he gave to it his individual genius and individual labor, and this without injury to the interests committed to his charge as supervising architect.

"IV. Plaintiff resigned his office as supervising architect of the Treasury. This resignation took effect January 1, 1875. He was requested by the Secretary of State to remain in charge of the new building at a salary of $5000 a year, giving to it his entire time and attention. This he declined.

"V. Prior to the passage of the act authorizing the construction of the building plaintiff was told at a meeting where were present the Secretary of State and representatives of the Committees on Public Buildings and Grounds of the Senate and House of Representatives, that if he would make the plans they had no doubt that his services would be taken into consideration by Congress in making the necessary appropriations for the erection of the building, and that if his plans were accepted and he should superintend the construction of the building that he would be properly compensated.

"VI. The building for the Departments of State, War, and of the Navy was begun June 21, 1871, and finished in 1888. It does not appear that prior to the commencement of this action plaintiff made a demand for compensation as architect or superintendent of said building, except in an application to Congress."

The opinion of the court was delivered by Davis, J., and is reported in 25 C. Cl. 409. From such judgment the petitioner appealed to this court. After taking the appeal he died, and the action was revived in the name of his administratrix.

Mr. George S. Boutwell for appellant.

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Mr. Assistant Attorney General Dodge for appellees. *Mr. Charles W. Russell* was on his brief.

Mr. Justice Brewer delivered the opinion of the court.

In addition to those that have been quoted above, there was a seventh finding with respect to the schedule of the charges of architects and the rules governing the same, but in the view we have taken of this case that is immaterial. At the time the services sued for were rendered the plaintiff held the position of Supervising Architect of the Treasury, the salary of which, as fixed by Rev. Stat. § 235, was $5000 a year. The nature and extent of his duties were not specifically defined by law. But that they were of the character of those described in this case is implied from the title of "Supervising Architect." It is not claimed that any new office was created. On the contrary, the averment in the petition is that he was employed "in his professional capacity as an architect." In other words, that he rendered certain services not within the scope of his official duties as Supervising Architect of the Treasury. It will also be perceived that no express promise of payment for these services was made by any officer or representative of the government, for the suggestion and request in respect to the preparation of plans spoken of in the first finding carried with it no mention of compensation. Nor is there disclosed in the fifth finding any such promise. An expression to the plaintiff on the part of persons representing the government of their belief that his services would be compensated, is very far from a promise to pay. There is no pretence of any act of Congress authorizing payment, or in terms directing employment. Reliance is placed not upon an express but an implied promise, and recovery is sought upon a *quantum meruit*. Here we are confronted by these provisions of the Revised Statutes, which were in force at the time of these transactions:

"Sec. 1763. No person who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars, shall receive compensa-

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tion for discharging the duties of any other office, unless expressly authorized by law.

"SEC. 1764. No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same or any other Department; and no allowance or compensation shall be made for any extra services whatever, which any officer or clerk may be required to perform, unless expressly authorized by law.

"SEC. 1765. No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

Obviously, the purpose of Congress, as disclosed by these sections, was that every officer or regular employé of the government should be limited in his compensation to such salary or fees as were by law specifically attached to his office or employment. "Extras," which are such a fruitful subject of disputes in private contracts, were to be eliminated from the public service. Such purpose forbids a recovery in this case. Mr. Mullett as Supervising Architect of the Treasury was in the regular employ of the government at a stated salary of five thousand dollars. He was employed to render services which, if not strictly appertaining to his office or position, were of the same general character and to be performed at the same place. No new office was created; no express promise of payment was made; no act of Congress in terms gave authority to promise payment, or made any provision or appropriation for compensation. The case is one simply of a claim for compensation for extra services, when no express authority therefor can be found in any act of Congress.

These sections have been in force many years, and have received the consideration of this court in several cases: *Hoyt* v. *United States*, 10 How. 109; *Converse* v. *United States*,

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21 How. 463; *United States* v. *Shoemaker*, 7 Wall. 338; *Stansbury* v. *United States*, 8 Wall. 33; *Hall* v. *United States*, 91 U. S. 559; *United States* v. *Brindle*, 110 U. S. 688; *United States* v. *Saunders*, 120 U. S. 126; *Badeau* v. *United States*, 130 U. S. 439, 451; and *United States* v. *King*, 147 U. S. 676, in which most of the former cases were reviewed, and in which it was held that a clerk of a Circuit Court is not entitled to compensation for services in selecting juries in connection with the jury commissioner, there being no statute expressly authorizing such compensation.

A still later case is that of *Gibson* v. *Peters*, decided at the present term, *ante*, 342, in which Gibson, a United States district attorney, claimed that, having the right to represent the receiver of a national bank in a suit brought by such receiver, he had rendered or offered to render such services, and was therefore entitled to payment for such services out of the funds in the hand of the receiver, and this by reason of the provision in the Revised Statutes, section 5238, that all expenses of any such receivership should be paid out of the assets of the bank before distribution. It was held that his compensation was fully prescribed by sections 823 to 827 of the Revised Statutes, and that he could not recover anything in addition for these services, notwithstanding the general language of section 5238.

The present case illustrates the propriety of such legislation as is found in these sections. Eighteen years after the services were rendered, fourteen years after he had left the employ of the government, the petitioner commences his action to recover compensation. No written contract for the services is shown; no legislation appears which directs that any services be called for, outside of those to be rendered by the officers and employés of the government, or which recognizes that any extra services have been rendered, or provides any payment therefor. In the rapid changes which attend public life, many, if not most, of those who participated in the negotiations and arrangements which led up to the doing of this work by the petitioner, and who could doubtless have thrown light upon the matter, have passed away. Petitioner was in the employ

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of the government, and employed for work of like character to that sued for. He was the one officer or employé to whom, when this work had to be done, attention would naturally have been directed. It would seem from his delay in bringing suit that he recognized this work as within the scope of his regular duties. At the most, it can only be regarded as extra service, cast upon him as an officer of the government and by reason of his official position, and, as such, there is no express provision of law for its compensation.

The judgment of the Court of Claims is right, and it must be

Affirmed.

FARLEY *v.* HILL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

No. 56. Argued October 30, 31, November 1, 1893. — Decided December 11, 1893.

Passing by the question whether a receiver appointed by a court pending proceedings to foreclose a railroad mortgage is precluded from buying bonds on the market or from agreeing to unite with others in bidding at the sale, and the question whether the contract set up in this case is within the statute of frauds of the State of Minnesota, and the question whether, even if the contract was illegal and not enforceable in a court of equity, an account might not be compelled, the court holds that the plaintiff has failed in proving his case.

IN EQUITY. Decree dismissing the bill, from which complainant appealed. The evidence was voluminous, but the court seems to have stated in its opinion everything that is necessary to be stated in order to understand it. The case was before this court at October term, 1886, as stated in the opinion, under the title *Farley* v. *Kittson*, reported in 120 U. S. at p. 303. Since then Mr. Kittson has died, and the St. Paul Trust Company, the executor of his will, was substituted as defendant in his place. The facts, as stated by the court, with its opinion, were as follows:

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Counsel for Appellees.

On December 15, 1881, Jesse P. Farley filed in the Circuit Court of the United States for the District of Minnesota a bill of complaint against Norman W. Kittson, James J. Hill, and the St. Paul, Minneapolis and Manitoba Railway Company.

The object of the bill was to enforce the complainant's alleged right to share with Kittson and Hill in the proceeds of certain foreclosure proceedings against the St. Paul and Pacific Railroad Company and the first division of the St. Paul and Pacific Railroad Company, and wherein the St. Paul, Minneapolis and Manitoba Railway Company, a corporation organized by Kittson and Hill, in connection with other persons, had become the owners of the foreclosed properties.

To this bill the St. Paul, Minneapolis and Manitoba Railway Company demurred for want of equity, and Kittson and Hill filed a plea denying some of the allegations of the bill, and alleging that Farley, as receiver and manager, under appointment by a court, was precluded by reason of public policy from making any valid agreement with Kittson and Hill of the kind set up in the bill.

To this plea a replication was filed, and proofs were taken. The Circuit Court held that the agreement of the plaintiff with Kittson and Hill was unlawful and void, and on that ground sustained the plea and dismissed the bill. 4 McCrary, 138.

On appeal to the Supreme Court the decree of the Circuit Court was reversed, and the case was remanded with directions to overrule the plea and to order the defendants to answer the bill. 120 U. S. 303, 318.

The case was proceeded in in the Circuit Court. The defendants answered, replication was filed, and evidence was taken, and a final decree was rendered dismissing the bill. From that decree this appeal was taken.

Mr. Henry D. Bean and *George F. Edmunds* for appellant. *Mr. Edward D. Cooke* was with them on the brief.

Mr. George B. Young, (with whom was *Mr. M. D. Grover* on the brief,) for appellees.

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Mr. John Maynard Harlan for the St. Paul Trust Company, appellee.

Mr. Justice Shiras delivered the opinion of the court.

The bill sought to enforce an agreement whereby Farley, the plaintiff, and Kittson and Hill were to purchase, for their joint and equal benefit, bonds, secured by mortgages, of two railroad companies, of one of which Farley was receiver by appointment by the court, and of the other of which he was the general manager, by appointment of the trustees named in the mortgages.

The validity of such an agreement was denied by the defendants, and they sought to raise that question at the threshold of the case by filing a plea, setting up the supposed incompetency of Farley to enter into such a contract, and the court below sustained the plea and dismissed the bill. In order, however, to escape from the effect of certain allegations in the bill, which averred knowledge on the part of the bondholders of Farley's connection in interest with Kittson and Hill, the defendants included in their plea a denial of such allegations, and this court was of opinion that the proper office of a plea to a bill in equity was not to traverse its allegations, like an answer, nor yet, like a demurrer, while admitting those allegations, to deny the equity of the bill, but to present some distinct fact, which of itself creates a bar to the suit, and thus to avoid the delay and expense of going into the evidence at large. This view resulted in a reversal of the decree of the Circuit Court sustaining the plea, and the cause was remanded with directions to overrule the plea, and to order the defendants to answer. *Farley* v. *Kittson*, 120 U. S. 318.

The result of the new trial below was that the Circuit Court dismissed the bill, and, as we learn from the opinion of that court, mainly upon two grounds, namely, that the plaintiff had failed to sustain the allegations of his bill by sufficient proof, and that the agreement relied on by the plaintiff, even if proven, was, in view of his official position, invalid.

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Opinion of the Court.

Upon the second appearance of the cause in this court the proposition that was urged when it was here before is again pressed upon us, with great force of argument and illustration: That the position of Farley, as receiver and manager of the companies whose roads were embraced in the foreclosure proceedings, was such as to disable him from having an enforceable interest in a private agreement with parties intending to buy up the bonds of the companies and become purchasers of the railroads at the foreclosure sales.

Whether a receiver appointed by a court pending foreclosure proceedings is precluded from buying bonds on the market or from agreeing to unite with others in bidding at the sale is a question best decided on its own facts and when it shall be necessary to decide it. His position, no doubt, is a fiduciary one towards the creditors and stockholders of the company, and, in a proper case, disclosing fraud or unfairness, they could be heard to impugn any rights or interests he might acquire hostile to theirs. Nor do we wish to be understood as saying that facts might not be made to appear, in a given case, showing such dereliction of duty and such abuse of his position by a receiver as to justify a court of equity in declining to afford him a remedy even against those who had participated with him in unlawful schemes.

It has also been contended in this court that the contract set up in the bill was ineffective, because within the statute of frauds of the State of Minnesota, which declares that every contract for the sale of lands, or any interest therein, shall be void, unless the contract, or some note or memorandum thereof expressing the consideration, is in writing and subscribed by the party by whom the sale is made, or by his authorized agent; it appearing that the main object of the contract alleged was, through a purchase of the bonds of the railroad companies, to finally become the purchasers of the railroads on the foreclosure sale, such railroads and appurtenances being claimed to be lands within the meaning of said statute.

When, however, we come to a consideration of the case, as it appears in the pleadings and evidence, we find no difficulty in concurring with the view of the learned judge below, that the

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plaintiff failed in proving his case, and we are thus relieved from determining whether the defendants could escape from responding to their contract by setting up its invalidity on the grounds of public policy; whether, even if the contract was illegal and not enforceable in a court of equity, an account might not be compelled within the doctrine of the case of *Brooks* v. *Martin*, 2 Wall. 70, and whether such a contract would be within the statute of frauds of the State of Minnesota.

The evidence upon which the court below acted in finding that the plaintiff had failed to maintain his allegation that a contract had been entered into with Kittson and Hill comprises nearly two thousand pages, and it largely turns upon the testimony of Farley and of Fisher, his clerk, on behalf of the plaintiff, and of Hill, one of the defendants, on the part of the defence. Kittson, the other defendant, died before his testimony could be taken, although he had employed counsel to defend the case.

It is argued that, as it thus appears that the question of fact as to the existence of such a contract is *in equilibrio* as between Farley and Hill, the testimony of Fisher, Farley's clerk, but who is not a party, should turn the scale; and this might be just reasoning if the question in issue had to be determined upon the testimony of those three witnesses. But, as is pointed out in the opinion of the court below, there is an inherent improbability in the plaintiff's story — not in the assertion that he had become interested with others in the ownership of bonds and in the proposed purchase of the railroads, for such agreements are not unusual, but by reason of the absence of any writing expressing the agreement. A man of affairs, as the plaintiff was, would not be likely, in a matter of such magnitude, to rely upon a merely verbal agreement, and, as the transactions occupied a considerable time, we would expect, if such a contract really existed, to find letters or memoranda relating to it; but such are not produced. On the contrary, the letters and conversations that we find in the record, though trifling and inconsequential in themselves, do not point to or imply any subsisting agreement between Farley and Kittson and Hill.

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Opinion of the Court.

It is not necessary for us to say, or to think, that Farley and Fisher, in testifying as they did, perpetrated intentional falsehood. It is altogether possible that, from desultory conversations with Kittson and Hill, and from an exaggerated sense of his own importance in the matters in hand, Farley was led to believe that he was entitled to participate in the venture.

But a court cannot act upon such uncertain conjectures. A contract of the kind asserted by the plaintiff must be established to the entire satisfaction of a court of equity before its intervention can be demanded.

The utmost effect that can be given to the plaintiff's evidence is that he had reason to expect that he would be included as a party in the project of buying bonds and bidding at the sale of the railroads. But it is clear, from his own evidence, that he was not included in the actual transaction. He furnished no part of the moneys used, and is not shown to have contributed any special or peculiar information important to the syndicate. His bill, therefore, is filed for an account of a partnership or enterprise in which he really did not participate. His remedy, if he is entitled to any, would seem to be an action at law for damages, though it is difficult to see that there was any consideration proceeding from him, either in money contributed or in personal services of any kind, out of which a legal obligation could arise, or which could furnish a measure of damages.

Our conclusion is that the court below was right in dismissing the bill, and its decree is accordingly

Affirmed.

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TURNER *v.* SAWYER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 70. Submitted November 6, 1893. — Decided December 11, 1893.

In a suit in equity to have T. declared a trustee, for the use of S., of an interest in a mine, and to compel a conveyance of the same to S., T. set up two sources of independent title in himself: (1) the purchase of a portion of the interest at an execution sale under a judgment in a suit in which process was not served upon S., no appearance entered for him, no judgment entered against him, and in which he was never in court; (2) proceedings under Rev. Stat. § 2324 by T. against S. as an alleged "co-owner" of the mine to compel him to contribute to the payment of the annual labor on the mine for the year 1884, by which proceeding it was claimed that the interest of S. in the mine became forfeited to T. At the time when the labor was done for which contribution was demanded, S. had not received the deed for his interest, and the sheriff's deed to T. of the interest which he claimed was not delivered until March, 1885. *Held*,

(1) That T. acquired no interest in the share of S. in the mine by the sheriff's deed;

(2) That T. was not a coöwner in the mine with S. during the year 1884, within the meaning of the statute, which, as it provides for the forfeiture of the rights of a coöwner, should be construed strictly.

By the laws of Colorado, title to land sold under execution remains in the judgment debtor till the deed is executed.

Cotenants stand in a relation of mutual trust and confidence towards each other, and a purchase by one of an outstanding title or incumbrance, for his own benefit, inures to the benefit of all, and when acquired, is held by him in trust for the true owner.

The general rule laid down in *Garland* v. *Wynn*, 20 How. 6, following in principle *Comegys* v. *Vasse*, 1 Pet. 193, 212, and maintained in *Monroe Cattle Co.* v. *Becker*, 147 U. S. 47, 57, that where several parties set up conflicting claims to property, with which a special tribunal may deal, as between one party and the government, regardless of the rights of others, the latter may come into the ordinary courts of justice, and litigate their conflicting claims, is announced to be the settled doctrine of this court.

THIS was a bill in equity filed by the appellee Sawyer against Robert Turner, George E. McClelland, and J. S.

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Statement of the Case.

Allison, the purpose of which was to have the defendant Turner declared a trustee for the use of the plaintiff of an undivided five-eighths interest in what was known as the "Wallace lode," which had been previously patented by the government to Turner, and to compel a conveyance of the same to the plaintiff.

The case was submitted upon an agreed statement of facts, which was substantially as follows: The Wallace lode, so called, was discovered and located by John Clark on September 20, 1878. On August 12, 1882, Clark conveyed an undivided three-fourths of this lode to Amos Sawyer and Marcus Finch. On May 1, 1882, Clark conveyed the other one-fourth interest to William Hunter, but the deed was never recorded, the parties supposing it to be lost, and on October 25 he made another deed to Hunter, which contained a recital that it was made to supply the place of the other. On October 26, 1882, Amos Sawyer and Marcus Finch reconveyed the undivided one-half of the lode to John Clark. On January 8, 1883, Marcus Finch conveyed an undivided one-eighth to Alice E. Finch. On March 16, 1883, Clark and Hunter conveyed three-fourths of the Wallace lode to Amos Sawyer and John S. Sanderson.

At this time, then, the lode was owned as follows: Amos Sawyer, one-half or four-eighths; John S. Sanderson, three-eighths; Alice E. Finch, one-eighth.

It so remained from March 16, 1883, to January 12, 1885, when Amos Sawyer assumed to convey his undivided one-half interest to Alfred A. K. Sawyer, who also became possessed of the one-eighth interest of Alice E. Finch, November 3, 1886.

The controversy arose over a lien filed August 14, 1883, by one John F. Teal for annual labor done upon the lode at the request of John S. Sanderson and Amos Sawyer. Teal claimed a lien for the sum of $148.10, and filed notice thereof in the recorder's office of Clear Creek County. One Charles Christianson also filed a similar notice, claiming a lien for $227.95. On January 12, 1884, Teal instituted a suit in the county court of Clear Creek County to enforce his lien, and

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made John S. Sanderson, Marcus Finch, P. F. Smith, and —— Sawyer defendants as the owners thereof. There was no service upon Sawyer, and he was not in court. On June 2, 1884, Teal proceeded to sell the interest of John S. Sanderson, Marcus Finch, and P. F. Smith to pay the amount of his decree, at which sale A. K. White became the purchaser, took his certificate of purchase from the sheriff, and sold and assigned it to Turner, who obtained a sheriff's deed on March 3, 1885. This deed purported to convey the whole Wallace lode. Christianson instituted a suit against the same defendants, as in the Teal suit, which was pending at the time, to enforce his lien against the same.

On April 24, 1885, Turner, who had done the annual labor on the claim for the year 1884, before he obtained a sheriff's deed, published a forfeiture notice against the appellee Sawyer under Rev. Stat. § 2324, but no forfeiture notice was published against Alice E. Finch, who still owned an undivided one-eighth of the lode, nor against Amos Sawyer, who owned one-half of the lode during the year 1884, and until January 12, 1885, as above stated. Appellant Turner declined an offer made January 18, 1885, to pay five-eighths of the $100 for the annual labor of 1884 on behalf of Alice E. Finch and Amos Sawyer, on the ground that the records showed only Sanderson and Sawyer as having any remaining interest. On October 27, 1885, Turner filed in the office of the clerk and recorder of Clear Creek County an affidavit that Alfred A. K. Sawyer, the appellee, had wholly failed to comply with the demands contained in the forfeiture notice. Subsequently, and about November 1, Turner instituted proceedings in the United States land office at Central City, Colorado, for the purpose of procuring a patent for the lode in his own name, and on April 13, 1886, a receiver's receipt was issued to him by the receiver of the land office, acknowledging payment in full for the entire lode, and on April 20 he conveyed an undivided one-fourth interest to George E. McClelland by deed recorded December 6, 1886, and another undivided one-quarter to J. S. Allison by deed recorded May 19, 1886.

On March 17, 1887, the appellee Sawyer filed this bill, charg-

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ing the patent to have been procured by the appellant Turner by false and fraudulent representations as to ownership, and praying that the title to an undivided five-eighths of the lode be deemed to belong to the appellee, and that Turner convey the same to him.

Upon the hearing in the court below, it was found that, at the time Turner applied for the patent and received the receipt therefor, he was not the legal owner of an undivided five-eighths of such lode, and it was decreed that he convey the same to the appellee Sawyer, and the other defendants were enjoined from interfering.

From this decree an appeal was taken to this court by Turner and McClelland.

Mr. L. C. Rockwell and *Mr. A. D. Bullis* for appellants.

When the entry was made in the Land Office, Sawyer had no interest in the Wallace lode.

Neither the complainant nor his grantors having filed an adverse claim to Turner's application for a patent, their rights became extinguished on the issuing and delivery of the patent to Turner.

Section 2324 of the Revised Statutes says: "Upon the failure of any one of several coöwners to contribute his proportion of the expenditures required hereby, the coöwners who have performed the labor or made the improvements may give such delinquent coöwners personal notice in writing or notice by publication."

Amos Sawyer was complainant's immediate grantor and coöwner in the Wallace lode with Sanderson when Turner did the annual labor in 1884.

It must be taken as a fact that Turner was there in support of and not in hostility to the rights of complainant or Sanderson in that lode, and while it may be urged with more or less force, that as between the judgment debtor, Sanderson, and Turner, the assignee of the judgment creditor, the latter had no legal right to the ground until after the expiration of the time of redemption, yet Sawyer cannot com-

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plain at what Turner did. It must be immaterial to him whether Sanderson or Turner did the annual labor for 1884; that was a charge upon the property which had to be met or else the title became forfeited, and the lode subject to be relocated on the first day of the succeeding year.

It is as incumbent upon one cotenant to antagonize his cotenant's application for patent as though no such relation existed. Upon that point we are sustained by the express provision of the law, as well as the construction of it by the Land Department of the government. Rev. Stat. §§ 2324, 2325; *Smelting Co.* v. *Kemp*, 104 U. S. 636; *Bissell* v. *Foss*, 114 U. S. 252; *Smiley* v. *Dixon*, 1 Penn. 439; *Henshaw* v. *Bissell*, 18 Wall. 255.

The Commissioner of the General Land Office held that, as no evidence had been submitted showing in what manner the notice of forfeiture was served upon the delinquent coöwners, or that the delinquent coöwners did not in the required time pay their proportionate share of the annual expenditures, the company must show, before issue of patent, the manner of serving the notice and that the delinquent coöwners did not pay their said proportion.

The learned Secretary said: "Section 2324 of Rev. Stat. must be construed in connection with section 2325. Both have reference to the possessory title of an applicant for patent and the mode of acquiring patent; the latter providing that if no adverse claim is filed during the period of publication, it shall be assumed that none exists. It would, therefore, seem immaterial, after proceedings under section 2325, whether or not the requirements of section 2324 are complied with to the extent named in your decision; because, if parties have not been properly notified, or have paid their share of assessment work, they must still file their adverse claim under the proceedings contemplated in section 2324. *They waive their rights by failure to file such claim*, and upon such failure the law not only assumes that no such claim exists, but if the antecedent publication and attendant proceedings have been regular, all that might be set up by suit in court has been adjudicated in favor of the applicant."

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Opinion of the Court.

This decision is borne out by the reason upon which the law is based. It is, that everybody having adverse interests to the applicant must antagonize his claim, or their rights will be gone. *Roberts* v. *Thorn*, 25 Texas, 728; *Frentz* v. *Klotsch*, 28 Wisconsin, 312; *Wright* v. *Sperry*, 20 Wisconsin, 331; *Brittin* v. *Handy*, 20 Arkansas, 381; *Matthews* v. *Bliss*, 22 Pick. 48.

Mr. Frederick D. McKenney, *Mr. Edward Lane*, and *Mr. Sidney H. Dent* for appellee.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

The real question in this case is whether the title to the half interest which Amos Sawyer assumed to convey to the appellee, Alfred A. K. Sawyer, January 12, 1885, was obtained by Turner through the proceedings taken by Teal in the enforcement of his lien for labor done upon this lode, or by the forfeiture notice published for the annual labor done in 1884.

(1) It is evident that nothing can be claimed by virtue of the suit begun by Teal, January 12, 1884, against John S. Sanderson, Marcus Finch, P. F. Smith, and —— Sawyer, as the owners of such lode, to enforce his lien, since there was no service upon Sawyer, no appearance entered for him, and he was never in court. Judgment was rendered in this suit against Sanderson, Smith, and Finch, the last two of whom appear to have had no interest in the property. Whether such proceedings were effective as against Sanderson, it is unnecessary to inquire. Not only was Sawyer not served in the suit, but in the execution sale no pretence was made of the sale of any interests except those of Sanderson, Smith, and Finch, which were struck off to A. K. White, and were subsequently sold by him, to Turner, to whom the sheriff's deed was given March 3, 1885.

(2) It remains then to consider whether Turner acquired such interest by the publication of his forfeiture notice against

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Sawyer for the annual labor of 1884. This notice was as follows:

"To A. A. K. Sawyer, residence unknown:

"You are hereby notified that I have performed the annual labor required by law for the year 1884 upon the Wallace lode, situated in Cascade mining district, Clear Creek County, Colorado, and that unless within the time prescribed by law you pay your proportionate amount of said expenditure your interest in said lode will be forfeited to me under the provisions of section 2324 of the Revised Statutes of the United States.

"ROBERT TURNER."

This notice was published pursuant to Rev. Stat. § 2324, which enacts, that "upon the failure of any one of several coöwners to contribute his proportion of the expenditures required hereby, the coöwners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent coöwner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his coöwners, who have made the required expenditures."

It will be observed that the right to give this notice of a claim for contribution is limited to a *coöwner* who has performed the labor. Turner was not a coöwner with Sawyer at any time during 1884, as Alfred A. K. Sawyer did not receive his deed from Amos Sawyer until January 12, 1885, and Turner did not receive his deed from the sheriff until March 3, 1885. He did, however, hold an inchoate title by virtue of White's purchase at the execution sale of June 2, 1884, and the subsequent assignment, August 25, 1884, of the sheriff's certificate to him. He appears also to have obtained the assignment of certain other judgments which had been re-

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covered by William Hunter against Sanderson and Smith. These judgments were assigned to him August 27, 1884, sales made under them January 12, 1885, and certificates of sale issued to Turner, who thus became the purchaser under these judgments. Neither of these, however, made him a coöwner during the year 1884 within the meaning of the statute, which, providing as it does for the forfeiture of the rights of a coöwner, should be strictly construed. Indeed, by the laws of Colorado title to land sold under execution remains in the judgment debtor until the deed is executed. *Hayes* v. *N. Y. Mining Co.*, 2 Colorado, 273, 277; *Laffey* v. *Chapman*, 9 Colorado, 304; *Manning* v. *Strehlow*, 11 Colorado, 451, 457.

This accords with cases from other States, which hold that the estate of the defendant in execution is not divested by a seizure and sale of his lands, but only by a payment of the purchase money and delivery of a deed. The sheriff's certificate is necessary as written evidence to satisfy the statute of frauds and to identify the holder as the person ultimately entitled to the deed, but it does not pass the title to the land nor constitute the purchaser the owner thereof. *Catlin* v. *Jackson*, 8 Johns. 520; *Gorham* v. *Wing*, 10 Michigan, 486, 493; *Green* v. *Burke*, 23 Wend. 490, 498; *Hawley* v. *Cramer*, 4 Cow. 717, 725.

It seems, however, that Turner, soon after the making and filing by him of an affidavit of non-payment by Sawyer of his alleged proportion of his claim for labor, instituted proceedings in the land office at Central City for the purpose of procuring a patent for this lode to be issued to himself alone, and prosecuted such proceedings so far as to obtain on April 13, 1886, a receiver's receipt so called, issued from the land office and delivered to him. This receipt was recorded in the recorder's office of Clear Creek County, Colorado, and on April 20, Turner conveyed to appellants Allison and McClelland each an undivided one-quarter interest in the lode. Whether he procured such receiver's receipt by fraudulent and false representations, as charged in the bill, it is unnecessary to determine. It is clear, to put upon it the construction most favorable to him, that he acted under a misapprehension of

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his legal rights. There is nothing in the record showing that he ever became possessed of Sawyer's interest in the lode. Assuming that, under the proceedings in the Teal suit, he had acquired the legal title to Sanderson's interest, he became merely a tenant in common with Sawyer, and his subsequent acquisition of the legal title from the land office inured to the benefit of his cotenants as well as himself. It is well settled that cotenants stand in a certain relation to each other of mutual trust and confidence; that neither will be permitted to act in hostility to the other in reference to the joint estate; and that a distinct title acquired by one will inure to the benefit of all. A relaxation of this rule has been sometimes admitted in certain cases of tenants in common who claim under different conveyances and through different grantors. However that may be, such cases have no application to the one under consideration, wherein a tenant in common proceeds surreptitiously, in disregard of the rights of his cotenants, to acquire a title to which he must have known, if he had made a careful examination of the facts, he had no shadow of right. We think the general rule, as stated in *Bissell* v. *Foss*, 114 U. S. 252, 259, should apply; that "such a purchase" (of an outstanding title or incumbrance upon the joint estate for the benefit of one tenant in common) "inures to the benefit of all, because there is an obligation between them, arising from their joint claim and community of interest; that one of them shall not affect the claim to the prejudice of the others. *Rothwell* v. *Dewees*, 2 Black, 613; *Van Horne* v. *Fonda*, 5 Johns. Ch. 388; *Lloyd* v. *Lynch*, 28 Penn. St. 419; *Downer* v. *Smith*, 38 Vermont, 464."

A title thus acquired, the patentee holds in trust for the true owner, and this court has repeatedly held that a bill in equity will lie to enforce such trust. *Johnson* v. *Towsley*, 13 Wall. 72; *Moore* v. *Robbins*, 96 U. S. 530; *Marquez* v. *Frisbie*, 101 U. S. 473; *Rector* v. *Gibbon*, 111 U. S. 276, 291; *Monroe Cattle Co.* v. *Becker*, 147 U. S. 47.

It is contended, however, that Sawyer is precluded from maintaining this bill by the fact that he filed no adverse claim to the lode in question under Rev. Stat. § 2325. This section

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declares that "if no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of the sixty days of publication" of notice of application for patent, "it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter." By § 2326, "where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim," etc. In this case there was no conflict between different locators of the same land, and no contest with regard to boundaries or extent of claim, such as seems to be contemplated in these provisions. Turner did not claim a prior location of the same lode, and made no objection to the boundaries or extent of Sawyer's claim, but asserted that he had acquired Sawyer's title by legal proceedings. The propriety of such claim was not a question which seems to have been contemplated in requiring the "adversing" of hostile claims. In this particular the case of *Garland* v. *Wynn*, 20 How. 6, is in point. In that case it was held that where the register and receiver of public lands had been imposed upon by *ex parte* affidavits, and a patent has been obtained by one having no interest secured to him in virtue of the preëmption laws, to the destruction of another's right who had a preference of entry, which he preferred and exerted in due form, but which right was defeated by false swearing and fraudulent contrivance brought about by him to whom the patent was awarded, that the jurisdiction of the courts of justice was not ousted by the regulations of the Commissioner of the General Land Office. "The general rule is," says Mr. Justice Catron, "that where several parties set up conflicting claims to property, with which a special tribunal may deal, as between one party and the government, regardless of the rights of others, the latter may come into the ordinary courts of justice and litigate the conflicting claim." Such was the case of *Comegys* v. *Vasse*, 1 Pet. 193,

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Counsel for Appellees.

212, and the case before us belongs to the same class of *ex parte* proceedings; nor do the regulations of the Commissioner of the General Land Office, whereby a party may be held to prove his better claim to enter, oust the jurisdiction of the courts of justice. We announce this to be the settled doctrine of this court. See also *Monroe Cattle Co.* v. *Becker*, 147 U. S. 47, 57, and cases cited.

The judgment of the court below was right, and it is, therefore, *Affirmed.*

BELKNAP *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 90. Argued November 20, 21, 1893. — Decided December 11, 1893.

Ordinarily a court has no power to grant a new trial at a term subsequent to that at which the original judgment was rendered.

The Court of Claims, however, under Rev. Stat. § 1088, has power to grant a new trial in such case on a motion on behalf of the United States, and a mandate from this court does not affect that power.

When such a motion is made on behalf of the government on the ground that its officers understood that there was an agreement that a case which had been appealed to this court by the United States, and had been remanded to that court by this court, on the ground that the appellants had not entered it here, was to abide the result in another case appealed from the Court of Claims by the United States and decided here in their favor, the granting of the motion by the Court of Claims must be taken by this court as conclusive on the question whether the evidence warranted the action of that court, as that evidence is not preserved.

The payment to an Indian agent of the amount appropriated by Congress for the payment of his salary being less than the amount fixed by general law as the salary of the office, and his receipt of the sum paid "in full of my pay for services for the period herein expressed," is a full satisfaction of the claim.

United States v. *Langston*, 118 U. S. 389, explained and limited.

Mr. George A. King, (with whom was *Mr. Harvey Spalding* on the brief,) for appellant.

Mr. Assistant Attorney General Dodge, (with whom was *Mr. Charles C. Binney* on the brief,) for appellees.

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Opinion of the Court.

MR. JUSTICE BREWER delivered the opinion of the court.

The history of this case is as follows: In 1882 the appellant filed his petition in the Court of Claims, alleging that as a duly appointed and commissioned United States Indian agent for a series of years, he was entitled to a salary of $1800 per annum; that he had only received a certain portion of that amount, and praying judgment for the balance. A trial was had before the court, which, on March 19, 1883, filed its findings of fact, and rendered judgment in his favor for the sum of $3400. At the same time was tried the case of *Charles Mitchell* v. *United States*, and they were both argued as presenting the same question of law, to wit, whether a public officer could "recover the difference between the salary established by law for the office which he held and the amount paid to him in accordance with the appropriations made by Congress." An appeal was taken in each case by the United States. That in the *Mitchell case* was duly entered in this court, and was submitted on briefs on March 30, 1883. On November 5 of that year this court rendered its decision in favor of the United States, reversing the judgment of the court below. 109 U. S. 146.

The appeal in the present case was taken on June 14, 1883, but was not entered by the appellant at the October term following, as required by the rules of this court. Thereupon the appellee caused the appeal to be docketed and dismissed; and on May 12, 1884, filed with the Court of Claims the mandate, in which the following orders were set out:

"And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and eighty-three, the said cause came on to be heard before the Supreme Court, and it appearing that the appellant has failed to have its appeal filed and docketed in conformity with the rules of this court: It is now here ordered and adjudged by this court that their appeal from the Court of Claims be, and the same is hereby, docketed and dismissed.

"And it is further ordered that this cause be, and the same is hereby, remanded to the said Court of Claims. (May 5, 1884.)

"You, therefore, are hereby commanded that such proceed-

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ings be had in said cause as, according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding."

On the 13th of May the United States, by the Attorney General, filed a motion in the Court of Claims for a new trial on the ground that wrong and injustice in the premises had been done to the United States. The reasons therefor, as stated, were that the two cases were heard together; that in both the judgment was for the plaintiff, and both cases were appealed to the Supreme Court; that the same questions of law were involved in each case, and that the defendants understood that the appeal in this case was to abide the decision in the case of Mitchell; that, relying upon this understanding, they took no further action in this case, and it was only in consequence of such reliance that the transcript was not filed by them in the Supreme Court, and the opportunity thus given to the appellant to have the case docketed and dismissed; that by the Mitchell case the law has been decided adversely to the claim of petitioner, and, therefore, that wrong and injustice would under the circumstances be done by permitting the judgment to stand.

On the 2d of June, 1884, the Court of Claims sustained the motion, and granted a new trial. Of this appellant complains. As the new trial was granted at a term subsequent to that at which the original judgment was rendered, (the terms of the Court of Claims beginning on the first Monday in December in each year, Rev. Stat. § 1052,) there would ordinarily be no power in the court to grant such new trial. *Coughlin* v. *District of Columbia*, 106 U. S. 7; *Brooks* v. *Railroad Company*, 102 U. S. 107. But there is in the Revised Statutes a peculiar provision, applicable only to the Court of Claims, which is as follows:

"SEC. 1088. The Court of Claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court

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that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law."

In order to give full effect to this statute the Court of Claims must have power to grant a new trial at a term subsequent to that at which the judgment was rendered, for it explicitly provides that it may be exercised at any time within two years. This section has been before this court in several cases, and in them its scope and effect considered and determined. *United States* v. *Ayres*, 9 Wall. 608; *United States* v. *Crusell*, 12 Wall. 175; *Ex parte Russell*, 13 Wall. 664; *Ex parte United States*, 16 Wall. 699; *United States* v. *Young*, 94 U. S. 258; *Young* v. *United States*, 95 U. S. 641, 642, 643. That a mandate from this court does not prevent the operation of this statute or take away the power or interfere with the discretion of the Court of Claims to grant a new trial was settled in *Ex parte Russell*, *supra*.

The testimony presented to the court in support of this motion is not preserved. We must, therefore, assume it to have been sufficient to establish the facts stated in the motion, and the only question for us to consider is as to the power of the court, upon those facts, to order a new trial. Counsel for appellant contend that they disclose nothing but a mere mistake of law, or ignorance of the rules and practice of this court, on the part of the officers of the government, and that under *Green* v. *Elbert*, 137 U. S. 615, such matters are insufficient. But we do not so understand the record. No case abides the decision of another case except by agreement of the parties; and so, when it is stated that the defendants understood that the appeal in this was to abide the decision in the *Mitchell case*, what is meant is that they understood that an agreement to that effect had been made. If such an agreement had actually been made by the parties, and then, in wilful disregard thereof, one party had taken the steps disclosed here of docketing and dismissing the appeal, a court would properly interfere to prevent the successful consummation of such attempted wrong. Instead of charg-

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ing such an agreement, and a deliberate breach thereof by the appellant, all that is claimed by the United States is that there was on their part an understanding that there was such an agreement, and that they acted in reliance upon such an understanding. We are to assume that the testimony showed that there were reasonable grounds for believing in the existence of such an agreement, and for acting in reliance thereupon. The defendants were guilty of no laches or omissions, and the effect upon them is the same as if there had been, in fact, an agreement and a wilful breach. That being so, it would evidently be a wrong, an injustice to the government, not to relieve it from the consequences of such a mistake of fact, and to continue in force a judgment which ought not to have been rendered. We think that the Court of Claims was authorized, upon the facts stated in this motion, to grant a new trial.

It becomes, therefore, necessary to consider the facts as disclosed by the findings made upon the second trial and in connection with the various provisions of the statutes. Section 2052 of the Revised Statutes contains this provision:

"The President is authorized to appoint from time to time, by and with the advice and consent of the Senate, the following Indian agents: . . . Four for the tribes in California, at an annual salary of eighteen hundred dollars each."

On February 4, 1876, appellant was commissioned by the President as agent for the Indians of the Tule River Agency in California. On filing his bond he received a letter enclosing his commission, in which it was stated that his "compensation remains at $1500 per annum." On the 5th of March, 1880, he was reappointed, with a commission in like form. Notice of this appointment was sent to him on the 15th of March by the Commissioner of Indian Affairs, and in the letter was this statement: "The salary of the office is $1000 per annum." The appellant discharged the duties of the office from the time of his appointment, continuously, until September 30, 1882, and received the salary appropriated by Congress therefor, by the several appropriation acts during that time, and his receipts for such compensation contain this

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recital: "Being in full of our (my) pay for services for the period herein expressed." Neither the appropriation law in force when the Revised Statutes took effect, nor any of those of the nine succeeding years, appropriated a salary of $1800 for the Tule River Agency. Such appropriations were as follows:

"1873–'74, act of February 14, 1873, (17 Stat. 437, c. 138,) $1500
1874–'75, act of June 22, 1874, (18 Stat. 146, c. 389,).. 1500
1875–'76, act of March 3, 1875, (18 Stat. 420, c. 132,).. 1500
1876–'77, act of August 15, 1876, (19 Stat. 176, c. 289). 1500
1877–'78, act of March 3, 1877, (19 Stat. 271, c. 101,).. 1500
1878–'79, act of May 27, 1878, (20 Stat. 63, c. 142,).... 1000
1879–'80, act of February 17, 1879, (20 Stat. 295, c. 87,) 1000
1880–'81, act of May 11, 1880, (21 Stat. 114, c. 85,)... 1000
1881–'82, act of March 3, 1881, (21 Stat. 485, c. 137,).. 1000
1882–'83, act of May 17, 1882, (22 Stat. 68, c. 163,)... 1000"

Of these ten appropriation acts the first four made appropriations for only three agencies in California, (Hoopa Valley, Round Valley, and Tule River;) the fifth made an appropriation for only two of these agencies, (Round Valley and Tule River;) while the last five made appropriations for four agencies, that of Hoopa Valley being restored and the Mission Agency being added, but the salary of the agent at this last point was at first fixed at $3000, and by the act of June 14, 1878, 20 Stat. 115, 119, c. 191, reduced to $1300, at which figure it remained under the other acts.

In all these ten acts the appropriations for the pay of the other California agents, as well as the one at Tule River, differ from the figure named in section 2052; in the first five acts the other appropriations being at the same rate as that allowed for Tule River, while in the last five the Round Valley agent is paid $1500, the Mission agent $1300, and the other two $1000.

Since this case was commenced we have had before us the following cases in which a claim was made, on behalf of an officer of the United States, of a right to recover more than

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the amount appropriated by Congress for his compensation by reason of the existence of a statute prescribing a salary. *United States* v. *Fisher*, 109 U. S. 143; *United States* v. *Mitchell*, 109 U. S. 146; *United States* v. *Langston*, 118 U. S. 389; *Wallace* v. *United States*, 133 U. S. 180; and *Dunwoody* v. *United States*, 143 U. S. 578. In one of these cases, *United States* v. *Langston*, we held that the act prescribing the salary controlled; in the others, that the appropriation acts were conclusive as to the amount the officer was entitled to receive. The difference in result does not, however, show a variation in ruling. On the contrary, all the cases have been decided in accordance with the general rule laid down in *United States* v. *Mitchell*, *supra*: "The whole question depends on the intention of Congress as expressed in the statutes."

In the *Langston case* it appeared that the salary of the minister to Hayti was fixed by the Revised Statutes at $7500, and that that sum was annually appropriated until the year 1883. In the statutes of two of those years, to wit, 1879 and 1880, it was expressly provided that the appropriation should be in full for the annual salary, and that all laws and parts of laws in conflict with the provisions of the act should be repealed. In the years 1883, 1884, and 1885 there was simply an appropriation of $5000 for the minister to Hayti. The plaintiff held the office from September 28, 1877, until July 24, 1885. Until 1883 he was paid at the rate of $7500 per annum, but for the remaining years he received only the amount of the appropriation, to wit, $5000 per annum. And this court held that there was nothing in the language of these last appropriation acts which could be satisfactorily construed as repealing the express language of the section fixing the salary at $7500 per annum — a salary which had been recognized by Congress for ten years in its appropriations, and by language in some of the acts clearly declaring that to be the salary attached to that office. Repeals by implication are not favored, and it was held that the mere failure to appropriate the full salary was not, in and of itself alone, sufficient to repeal the prior act. And yet the court conceded

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at the close of the opinion that "the case is not free from difficulty."

While not questioning at all the *Langston case*, we think that it expresses the limit in that direction.

In this case there are several considerations which tend to show that appellant's right to compensation was not fixed by § 2052, Revised Statutes. In the first place, the agency at Tule River is not specifically named in the section, though doubtless it would come within its description. It had been an agency existing before the Revised Statutes, and never had there been for it any appropriation over $1500. Congress, in the ten appropriation acts passed after the Revised Statutes and before the close of appellant's term of service, did not recognize the salary of $1800 in respect to any one of the agencies in California. It discriminated between them, giving different salaries to different agencies, some of these being in excess of any prescribed by § 2052. The fact of discrimination, and the constant disregard of § 2052 in respect to all agencies, indicates that the matter was present to the consideration of Congress, and that in naming the various amounts during these several years it was fixing the entire compensation which it intended should be given. It was a legislative readjustment of salaries, for it is not to be believed that Congress during all these years was simply appropriating a part of that which it knew was due to its officers. A significant fact is, too, that when it first appropriated for the Mission Agency, on May 27, 1878, it appropriated $3000, but on June 14, 1878, within less than three weeks, it passed an act reducing the salary to $1300. Still more significant is the fact that up to 1878 the appropriation for Indian agents was without individualizing the amounts for the separate agencies. Thus in the act of August 15, 1876, 19 Stat. 176, c. 289, (and the other statutes were similar,) we find the appropriation in these words: "For pay of sixty-eight agents of Indian affairs, at one thousand five hundred dollars each, except the one at Iowa, at five hundred dollars, namely;" while from 1878 onward each agency was named, and the pay attached to that agency separately designated. Thus in the act of May 27, 1878, 20

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Stat. 64, c. 142, the appropriation commences in this way: "For pay of seventy-four agents of Indian affairs at the following named agencies, at the rates respectively indicated, namely: At the Warm Springs agency, at one thousand dollars; at the Klamath agency, at one thousand one hundred dollars;" and then follow in like manner the name of each agency, and the salary attached thereto, several of the salaries being in excess of those given by said section 2052. Evidently this change grew out of section 4 of the appropriation act of 1876, 19 Stat. 200: "That hereafter the estimates for appropriations for the Indian service shall be presented in such form as to show the amounts required for each of the agencies in the several States or Territories, and for said States and Territories respectively."

This act was passed August 15, 1876, and, apparently, there was not sufficient time before the passage of the appropriation act of 1877, March 3, 1877, to satisfactorily prepare the estimates, and so the form of the legislation of Congress was not changed until 1878. But when changed it was a change indicating that each particular agency was called to the attention of Congress, and the amount which should be paid to the agent at that agency specifically determined. In this connection it is well to note the language used in the appropriation acts to denote the purpose of the appropriation. Thus, in the act of 1878, and subsequent statutes are similar, it is that the "following sums be, and they are hereby, appropriated . . . for the purpose of paying the current and contingent expenses of the Indian Department;" and immediately thereafter follows the language which we have heretofore quoted, "for pay of seventy-four agents . . . at the rates respectively indicated, namely." This language carries a strong implication that Congress was intending to pay the current expenses in full, and intended that the sums named for these Indian agents should be the total amount they should be entitled to receive. When to these facts is added that the plaintiff with his first commission received notice that the salary was to be $1500, as had been for years theretofore appropriated by Congress, and on reappointment that it was

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Statement of the Case.

$1000, and that during the years of his service he received the appropriations and receipted for them as in full payment for his services, we think it must be adjudged that he has received all that of right and by law he is entitled to receive, and that the judgment of the Court of Claims should, therefore, be

Affirmed.

WARD v. COCHRAN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

No. 110. Argued and submitted November 23, 24, 1893. — Decided December 18, 1893.

An express order of court during the judgment term, continuing a cause for the purpose of settling, allowing, signing, and filing a bill of exceptions, and the settlement and allowance and filing of the bill, during the terms to which the continuance was made, takes the exceptions out of the operation of the general rule that the power to reduce exceptions to form and have them signed and filed is, under ordinary circumstances, confined to the term at which the judgment is rendered.

A bill of exceptions which, in so far as it relates to the charge, specifies with distinctness the parts excepted to, and the legal propositions to which exceptions are taken, is sufficient.

A defendant in ejectment who relies on adverse possession during the statutory period as a defence must show actual possession — not constructive — and an exclusive possession — not a possession in participation with the owner, or others.

When a special verdict is rendered, all the facts essential to entitle a party to a judgment must be found.

A judgment rendered on a special verdict failing to find all the essential facts is erroneous; and consequently a special verdict in an action of ejectment, which finds that the grantor of the defendant entered into possession of the land in controversy under a claim of ownership and that he remained in the open, continued, notorious, and adverse possession thereof for the period of sixteen years, when he sold and transferred the same to the defendant, who remained in open, continuous, notorious, and adverse possession of the same under claim of ownership down to the present time, is defective in that it does not find that the adverse possession was actual and exclusive.

THIS was an action of ejectment brought at the November term, 1887, in the Circuit Court of the United States for the

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District of Nebraska, by Seth E. Ward, a citizen of the State of Missouri, against Elmer G. Cochran, a citizen of the State of Nebraska, to recover the possession of twenty acres of land situated in the suburbs of the city of Omaha, and described as the west one-half of the northeast one-quarter of section 4, township 15 north, range 13 east, in Douglas County, Nebraska.

In pursuance of the practice in that State, under which two trials in ejectment are necessary to a final determination of a question of title, a trial was had before a judge, without a jury, and a judgment was entered in favor of the defendant. This judgment was forthwith, on motion of the plaintiff, set aside and a new trial was awarded.

At this trial the record discloses that the plaintiff sustained his side of the issue by putting in evidence a chain of title from the United States to himself, consisting of a patent of the United States to Alexander R. McCandlers, dated March 13, 1861, for a tract of land, including the piece in dispute; a deed of Alexander R. McCandlers to Michael Thompson, dated May, 2, 1861, for the same tract; a deed of Michael Thompson and wife to Edward B. Taylor, dated July 5, 1862, for said tract; a mortgage of Edward B. Taylor to Ward, the plaintiff, dated July 28, 1871, on the twenty-acre tract in controversy, to secure the payment of certain promissory notes; the record of proceedings in suit by Ward, the plaintiff, against the heirs and legal representatives of Edward B. Taylor, who had died in 1872, to foreclose said mortgage, and a sheriff's deed, under decree in said suit, to Ward, the plaintiff, dated July 11, 1877; a deed of Edward A. Taylor (son and one of the heirs of Edward B. Taylor, and the only heir who had not been made a party to the foreclosure suit) to Ward, the plaintiff, dated June 25, 1885, for the twenty-acre tract in dispute. It was admitted that the value of the land was $20,000 at the time of the bringing of the suit.

The defendant adduced evidence tending to show that one John Flanagan had entered on the tract in dispute in 1868, under a parol sale of said tract to him by Edward B. Taylor; that Flanagan had continued in possession of the tract until 1885, when, on November 25 of that year, Flanagan and wife

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Argument for Defendant in Error.

conveyed the tract to the defendant by deed of that date, who entered into possession.

On December 9, 1889, the jury rendered a special verdict, in the following words and figures:

"We, the jury impanelled and sworn to try the issues joined in the above-entitled cause, do find and say that one John Flanagan, in the year 1868, entered into the possession of the west one-half of the northeast quarter of the southwest quarter of section 4, in township 15 north, of range 13th east of the 6th principal meridian, in Douglas County, Nebraska, being the land in controversy in this case, under a claim of ownership thereto, and that he remained in the open, continued, notorious, and adverse possession thereof for the period of sixteen (16) years thereafter and until he sold and transferred the same to the defendant in this case.

"We further find that said John Flanagan and Julia, his wife, by good and lawful deed of conveyance, conveyed said premises to the defendant in this suit in 1885, and surrendered his possession to this defendant, and that said defendant has remained in the open, continuous, notorious, and adverse possession of the same under claim of ownership down to the present time. We therefore find that at the commencement of this suit the defendant was the owner of and entitled to the possession of the said premises, and upon the issues joined in this case we find for said defendant."

On December 9, 1887, the plaintiff, by his counsel, moved for a new trial for reasons filed, and, on the same day, moved the court for judgment in his behalf notwithstanding the verdict.

On December 5, 1889, the motion for a new trial was overruled, and judgment was entered in favor of the defendant in pursuance of the verdict; and to said judgment a writ of error to this court was sued out and allowed.

Mr. Hugh C. Ward and *Mr. James Hagerman* for plaintiff in error.

Mr. John M. Thurston and *Mr. W. J. Connell*, for defendant in error, submitted on their brief:

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Argument for Defendant in Error.

I. This case was tried before a jury in the court below and a verdict rendered on the 9th day of December, 1887. Thereafter a motion for a new trial was held under advisement until the 5th day of December, 1889, of the November term of said court, when judgment was entered upon the verdict. It therefore appears that no bill of exceptions was prepared or presented at the trial term, and no order was asked with respect thereto by the plaintiff in error until the 26th day of December, 1889, just prior to the end of the November term, when the court entered an order without the consent of the defendant in error, giving the plaintiff until the first day of February, 1890, in which to present a bill of exceptions; a time beyond the said November term, at which the judgment was entered. We submit that it was not within the power of the court to make such an order; that the same was made without any notice to the defendant; and the bill of exceptions not having been signed and allowed at either the trial or the judgment term — and having in fact been signed and allowed on the first day of March, 1890, a date long subsequent to the suing out of the writ of error and the service of the citation in the case — the said bill of exceptions was not in time to preserve of record the alleged errors complained of. *Mühler* v. *Ehlers*, 91 U. S. 249.

II. The bill of exceptions in this case has been prepared in disregard of the rules of the court. *Hickman* v. *Jones*, 9 Wall. 197, 199, is in point where the court said: "We have to complain in this case, as we do frequently, of the manner in which the bill of exceptions has been prepared. It contains all the evidence adduced on both sides, and the entire charge of the court. This is a direct violation of the rule." The case at bar is similar to *Hanna* v. *Maas*, 122 U. S. 24.

III. The decisions of the highest court of a State with respect to title by adverse possession, when there are such, establish the rule of property in that State. *Harpending* v. *Reformed Dutch Church*, 16 Pet. 455. In the absence of state decisions to the contrary, it is the rule of this court, established by an unbroken line of decisions, that adverse possession of real property continued for the statutory period

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within which an action of dispossession could be commenced, ripens into a perfect and indefeasible title in fee simple.

In *Harpending* v. *Reformed Dutch Church*, *ubi supra*, it is laid down (following the head note) that, "After the elapse of twenty years from the commencement of adverse possession of the property claimed, the defendants had a title as undoubted as if they had produced a deed in fee simple from the true owners of that date; and all inquiry into their title or its incidents was effectually cut off."

This rule has been followed by this court in many other cases, but we cite only one, *Bicknell* v. *Comstock*, 113 U. S. 149, 152, in which Mr. Justice Miller, delivering the opinion of the court, says: "This court has more than once held that the lapse of time provided by the statutes makes a perfect title.

"In *Leffingwell* v. *Warren*, 2 Black, 599, it is said that 'the lapse of time limited by such statutes not only bars the remedy, but it extinguishes the right and vests a perfect title in the adverse holder.'

"And this doctrine is repeated in *Croxall* v. *Shererd*, 5 Wall. 268, 289; and in *Dickerson* v. *Colgrove*, 100 U. S. 578, 583."

The leading case in the State of Nebraska on the question of title by adverse possession is *Horbach* v. *Miller*, 4 Nebraska, 31. The later decisions on that question, citing and approving that case, are: *Gatling* v. *Lane*, 17 Nebraska, 77; *Stettnischer* v. *Lamb*, 18 Nebraska, 619; *Parker* v. *Starr*, 21 Nebraska, 680; *Gue* v. *Jones*, 25 Nebraska, 634; *Tourtelotte* v. *Pierce*, 27 Nebraska, 57; *Fitzgerald* v. *Brewster*, 31 Nebraska, 51; *Meyer* v. *Lincoln*, 33 Nebraska, 56. The following extract from *Meyer* v. *Lincoln* clearly states the rule established by these decisions: "By numerous decisions of this court it has been held that adverse possession of real estate, as owner, for ten years, gives a perfect title to the occupant. *Horbach* v. *Miller*, 4 Nebraska, 31, 47; *Gatling* v. *Lane*, 17 Nebraska, 77, 79; *Haywood* v. *Thomas*, 17 Nebraska, 237, 240; *Tex* v. *Pflug*, 24 Nebraska, 666, 669; *Levy* v. *Yerga*, 25 Nebraska, 764; *Obernalte* v. *Edgar*, 28 Nebraska, 70; *Crawford* v. *Galloway*,

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29 Nebraska, 261; *Peterson* v. *Townsend*, 30 Nebraska, 373, 376; *Alexander* v. *Wilcox*, 30 Nebraska, 793, 795."

Mr. Justice Shiras, after stating the case, delivered the opinion of the court.

Objection is made that the bills of exception were not allowed and signed either at the trial or the judgment term, and the case of *Müller* v. *Ehlers*, 91 U. S. 249, is cited to show that we cannot consider them for that reason.

From the record, it does indeed appear that the bills of exception were not allowed and signed during the term at which the judgment was rendered, but it also appears that, at said term, an order was entered stating that, inasmuch as the bills of exception could not be completed at that term, the time for preparing and presenting them was extended till February 1, 1890, at which time bills of exception might be allowed and signed with the same force and effect as if said action had been had within the usual time; and it also appears that on January 18, 1890, plaintiff's counsel served defendant's counsel with a copy of the bills of exception proposed, with notice that they would be presented for the judge's consideration on January 27, 1890. On that day, defendant's counsel did not appear, and thereupon the court entered an order, reciting the foregoing facts, and directing that the bills of exception be filed with the clerk of the court, and that defendant should have thirty days in which to file suggestions of amendment thereto, and continuing the cause till the further order of the court for the purpose of settling, allowing, and signing the bills; and it further appears that on March 1, 1890, the bills of exception were finally signed by the judge and filed. The record also discloses that the defendant protested against the action of the court in extending the time and in allowing and signing the bill of exceptions after the expiration of the term at which the judgment was rendered.

In the case of *Müller* v. *Ehlers*, relied on by the defendant in error, this court did hold that because the bill of exceptions had not been signed at or during the term at which the judg-

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ment was rendered, it could not be considered, and expressed itself as follows: "As early as *Walton* v. *United States*, 9 Wheat. 651, the power to reduce exceptions taken at the trial to form and to have them signed and filed was, under ordinary circumstances, confined to a time not later than the term at which the judgment was rendered. This, we think, is the true rule, and one to which there should be no exceptions, without an express order of the court during the term or consent of the parties save under very extraordinary circumstances. Here we find no order of the court, no consent of the parties, and no such circumstances as will justify a departure from the rule. A judge cannot act judicially upon the rights of parties, after the parties in due course of proceedings have both in law and in fact been dismissed from the court."

As we have seen, the present record discloses "an express order of the court during the judgment term, continuing the cause for the purpose of settling, allowing, signing, and filing the bills of exception," and this case is thus brought within the ruling in *Müller* v. *Ehlers*.

Our most recent utterance on this subject was in *Morse* v. *Anderson*, *ante*, 158, where it was held that this court would not review bills of exception signed after the time fixed by a special order of the court had expired.

As this record discloses that the exceptions relied on were taken at the trial, and that the delay was in reliance on an express order of the court, postponing the act of allowing and signing the bills, we think that we are not precluded from a consideration of the errors assigned.

A further preliminary objection is urged to the form of the bill of exceptions, which is said to be a mere transcript of the entire testimony and of the charge, and the case of *Hanna* v. *Maas*, 122 U. S. 24, is cited.

In that case it was held that when a bill of exceptions is so framed as not to present any question of law in a form to be revised by this court, the judgment must be affirmed, but the facts of the case were thus stated: "This bill of exceptions has been framed and allowed in disregard of the settled rules of law upon the subject. No ruling upon evidence is

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open to revision, because none appear to have been excepted to; and the overruling of the motion for a new trial is not a subject of exception. The bill of exceptions, instead of stating distinctly, as required by law and by the 4th Rule of this court, those matters of law in the charge which are excepted to, and those only, does not contain any part of the charge, or any exception to it, and undertakes to supply the want by referring to exhibits annexed, containing all the evidence introduced at the trial, the whole charge to the jury, and notes of a desultory conversation which followed between the judge and the counsel on both sides, leaving it to this court to pick out from those notes, if possible, a sufficient statement of some ruling in matter of law."

The present record presents a very different condition of facts, as the bill of exceptions, in so far as it relates to the charge, specifies with distinctness the parts of the charge excepted to and the legal propositions to which exceptions are taken. The view we take of the case does not compel us to consider the objections taken to the admission or rejection of evidence, and we are therefore not called upon to determine whether such objections are properly presented for review.

This was an action of ejectment for the recovery of a tract of land of which the boundaries and situation were not matters of dispute. It was conceded that both parties claimed to derive title from one E. B. Taylor, and that the plaintiff's evidence sufficed to entitle him to recover, unless such right of recovery was overcome by the defendant's claim of an adverse possession of a character and duration sufficient, under the laws of Nebraska, to create a good title.

The record discloses that the judge instructed the jury to make a finding of special facts; that the jury did so; that the plaintiff moved for judgment in his favor upon the verdict; that the defendant did likewise; and that the court sustained the defendant's motion and entered judgment in his favor.

The following are the statutory provisions of Nebraska relating to verdicts:

"SEC. 292. The verdict of a jury is either general or special. A general verdict is that by which they pronounce

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generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds the facts only. It must present the facts as established by the evidence, and not the evidence to prove them, and they must be so presented as that nothing remains to the court but to draw from them conclusions of law.

"SEC. 293. In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing, upon all or any of the issues; and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered on the journal.

"SEC. 294. When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly." Compiled Statutes of Nebraska, 1887. Code of Civil Procedure.

The action of the court below in rendering judgment on the special verdict in favor of the defendant forms the subject of the first assignment of error. The plaintiff's contention is that the special verdict did not warrant a judgment in favor of the defendant, because it did not find that the possession on which the defendant relied was actual and exclusive.

No state statute has been referred to as regulating or defining title by adverse possession, and, indeed, it is stated in the brief of defendant in error that there is no such statute; but there is a statutory provision that an action for the recovery of the title or possession of lands, tenements, or hereditaments can only be brought within ten years after the cause of such action shall have accrued.

Our investigation, therefore, into the sufficiency of the special verdict must be controlled by the principles established, in this branch of the law, by the decisions of the courts, particularly those of the Supreme Court of the State of Nebraska and of this court.

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In *French* v. *Pearce*, 8 Connecticut, 439, 440, it was said that "it is the fact of exclusive occupancy, using and enjoying the land as his own, in hostility to the true owner, for the full statutory period, which enables the occupant to acquire an absolute right to the land.

In *Sparrow* v. *Hovey*, 44 Michigan, 63, a refusal of the court to charge that, when the title is claimed by an adverse possession, it should appear that the possession had been "actual, continued, visible, notorious, distinct, and hostile," but merely charging the jury that the possession "must be actual, continued, and visible," was held erroneous. In Pennsylvania, it has been repeatedly held that, to give a title under the statute of limitations, the possession must be "actual, visible, exclusive, notorious, and uninterrupted." *Johnston* v. *Irwin*, 3 S. & R. 291; *Mercer* v. *Watson*, 1 Watts, 330, 338; *Overfield* v. *Christy*, 7 S. & R. 173.

In *Jackson* v. *Berner*, 48 Illinois, 203, it was held that an adverse possession sufficient to defeat the legal title, where there is no paper title, must be hostile in its inception, and is not to be made out by inference, but by clear and positive proof; and further, that the possession must be such as to show clearly that the party claims the land as his own, openly and exclusively.

In *Foulk* v. *Bond*, 12 Vroom, (41 N. J. Law,) 527, 545, it was said: "The principles on which the doctrine of title by adverse possession rests are well settled. The possession must be actual and exclusive, adverse and hostile, visible and notorious, continued and uninterrupted."

It was held in *Cook* v. *Babcock*, 11 Cush. 206, 209, that "when a party claims by a disseizin ripened into a good title by the lapse of time as against the legal owner, he must show an actual, open, exclusive, and adverse possession of the land. All these elements are essential to be proved, and failure to establish any one of them is fatal to the validity of the claim."

In *Armstrong* v. *Morrill*, 14 Wall. 120, 145, this court, speaking through Mr. Justice Clifford, said: "It is well settled law that the possession, in order that it may bar the recovery, must

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be continuous and uninterrupted as well as open, notorious, actual, exclusive, and adverse. Such a possession, it is conceded, if continued without interruption for the whole period which is prescribed by the statute for the enforcement of the right of entry, is evidence of a fee, and bars the right of recovery. Independently of positive statute law, such a possession affords a presumption that all the claimants to the land acquiesce in the claim so evidenced." *Hogan* v. *Kurtz*, 94 U. S. 773, is to the same effect.

The authorities in Nebraska are substantially to the same effect on questions of title by adverse possession.

A leading case is *Horbach* v. *Miller*, 4 Nebraska, 31, 46, 48, in which it was said that "the elements of all title are possession, the right of possession, and the right of property; hence, if the adverse occupant has maintained an exclusive adverse possession for the full extent of the statutory limit, the statute then vests him with the right of property, which carries with it the right of possession, and therefore the title becomes in him. . . . The submission of the case to the jury correctly was that if they believed, from the evidence, that the plaintiff in error, for ten years next before the commencement of the action, was in the actual, continued, and notorious possession of the land in controversy, claiming the same as his own against all persons, they must find for the plaintiff in error." In *Gatling* v. *Lane*, 17 Nebraska, 77, 82, the language used was: "A person who enters upon the land of another with the intention of occupying the same as his own, and carries that intention into effect by open, notorious, exclusive adverse possession for ten years, thereby disseizes the owner." In *Parker* v. *Starr*, 21 Nebraska, 680, 683, a recovery was sustained where the testimony clearly showed that "the defendant and those under whom he claims have been in the open, notorious, and exclusive possession for ten years next before the suit was brought." In *Ballard* v. *Hansen*, 33 Nebraska, 861, 864, the following instructions, which had been given in the trial court, were approved by the Supreme Court: "The jury are instructed that adverse possession, as relied upon by the plaintiffs in this action, is the open, actual, exclusive, notorious, and hostile

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occupancy of the land, and claim of right, with the intention to hold it as against the true owner and all other parties; such occupancy, if continuous for ten years, ripens into a perfect title, after which it is immaterial whether the possession be continued or not." "If you find and believe, from a preponderance of the testimony in this case, that the plaintiff was in the actual, open, notorious, exclusive, continuous possession of any of the lots in controversy for ten years, claiming to own and hold them as against all others, as to such lots he is entitled to recover."

Tested by these definitions, it is obvious that if the title relied on in this case, by the defendant below, was fully described and characterized by the special verdict, it was defective in two very essential particulars, in that it was not found to have been actual and exclusive. A possession not actual, but constructive; not exclusive, but in participation with the owner or others, falls very far short of that kind of adverse possession which deprives the true owner of his title.

Where a special verdict is rendered all the facts essential to entitle a party to a judgment must be found, and a judgment rendered on a special verdict failing to find all the essential facts is erroneous.

In *Prentice* v. *Zane's Administrator*, 8 How. 470, 483, it was said: "In the *Chesapeake Ins. Co.* v. *Stark*, 6 Cranch, 268, and *Barnes* v. *Williams*, 11 Wheat. 415, this court has decided that where, in a special verdict, the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, the court will not render a judgment upon such an imperfect special verdict, but will remand the cause to the court below with directions to award a *venire de novo*."

In *Hodges* v. *Easton*, 106 U. S. 408, where it was contended that an imperfect special verdict might be pieced out and the missing facts be supplied by reference to the other parts of the record, the same conclusion was reached, and the court below was directed to award a new trial.

In the present case, even if the verdict were regarded as a general one, and therefore entitled to be supported by the

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presumption that sufficient facts existed to sustain it, yet we should feel constrained to reverse the judgment, because of the errors complained of in the eighth, ninth, and tenth assignments.

The plaintiff's counsel requested the court to charge the jury that, in order that possession of land may overcome the title of the true owner, "there must be a concurrence of the following elements: Such possession must be actual, hostile, exclusive, open, notorious, and continuous for the whole period of ten years. Every element in this enumeration is absolutely essential, and if one of these elements does not exist there can be no adverse title acquired;" and the court did so charge; but the court then proceeded to say that, after having disposed of the written instructions, "I propose to go outside of what is there stated and give one on my own motion." Those voluntary instructions given by the learned judge, though correct in most respects, were imperfect in the very particulars in which we have found the special verdict defective. The jury were not told that, to make out the defence, the possession, in addition to certain other features properly specified, must be shown to have been actual and exclusive. This clearly appears in the final instruction, which was in the following terms:

"But if you take the other view and find that defendant has a good title and that he is entitled to recover, then I think you ought to go further and find the fact that he entered into the possession of the premises at a certain time, or as near as you can fix it from the testimony; that he occupied the premises; that he continued in possession for more than ten years prior to the commencement of this suit, which was December 4, 1886. You ought to find, if you can, from the testimony about the time that he went into possession, whether he continued in possession, and whether his possession was adverse, continuous, and hostile prior to the commencement of this suit, or whether Flanagan and his grantees, defendants in this suit, continued in possession that long, it is the same as if Flanagan was in possession that long himself.

"If you find for the defendant, find when he took posses-

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sion, if you can, and, as near as you can, how long he remained in possession before the commencement of this suit. Then your verdict will be, in addition to that, 'We therefore find that at the commencement of this suit the defendant was the owner and entitled to the immediate possession of the premises in dispute.' That disposes of the whole controversy as far as the verdict of the jury is concerned."

Nor do we think that this is one of those cases in which erroneous or insufficient instructions in one part of a charge are corrected or supplied by unobjectionable instructions, on the same questions, appearing in another part. It is evident that the attention of the jury must have been withdrawn from the instructions formally given, as requested, to those announced by the judge, as given on his own motion, and it seems evident that this action of the court misguided the jury, and led them to overlook essential questions involved in the issue they were trying. *Smiths* v. *Shoemaker*, 17 Wall. 630; *Moores* v. *National Bank*, 104 U. S. 625; *Gilman* v. *Higley*, 110 U. S. 47; *Vicksburg & Meridian Railroad Co.* v. *O'Brien*, 119 U. S. 103.

Whether, then, we regard the verdict as a special one, not containing findings sufficient to support the judgment, or as a general one, rendered in pursuance of imperfect instructions, we reach the conclusion that the judgment of the court below must be

Reversed and the cause remanded, with instruction to award a venire de novo.

HORN *v.* DETROIT DRY DOCK COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 129. Argued December 5, 1893. — Decided December 18, 1893.

In chancery proceedings in the Federal courts, when a plea in bar meets and satisfies all the claims of the bill, and it is sustained, it will, under

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Statement of the Case.

equity rule 33, avail the defendant so far as to require a final decree in his favor.

In this case the proofs taken fully and clearly establish the truth of the matters set up and alleged in the defendants' plea, including the complainant's receipt in full satisfaction of all claims.

While it is true that a receipt is open to explanation by parol proof to show what its real consideration was, the issue to that effect must be raised by the pleadings, and must have been taken in the court below, to be available here.

An accord and satisfaction cannot be set aside for mutual mistakes in regard to material facts, if the alleged mistakes have not been set up by proper pleadings.

THE single question presented by the record in this case is whether the action of the court below, in sustaining the plea in bar of the suit and dismissing the bill, was correct.

The appellant, who was the complainant below, alleged in her bill that in July, 1880, she was the owner of the steamers Garland and Excelsior, which were used and employed in navigating the Detroit River and the connecting waters; that the Detroit Dry Dock Company (one of the appellees) held mortgages on these steamers aggregating $22,643, the equity of redemption in which was of considerable value; that on July 22, 1880, the Garland, under command of George Horn, son of the complainant, while proceeding down the Detroit River collided with the steam yacht Mamie, which had on board an excursion party, several of whom were drowned as the result of the collision; that the personal representatives and heirs of those drowned, claiming that the Garland was in fault, commenced suits in admiralty in the United States District Court at Detroit to recover damages on account of their deaths; that the Detroit Dry Dock Company furnished bond for the steamer Garland, and became responsible to counsel for their fees, it being agreed between the complainant and the company that the latter should hold the title to the steamer Garland, in connection with its mortgage, as security for the indebtedness of the complainant, and of all liabilities incurred on her behalf; that shortly after the collision various suits were commenced in the state courts against the complainant personally for damages on account of the collision,

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and also a prosecution against her son, George Horn, as master of the Garland; that the complainant employed counsel to defend these suits; that at or about the same time a suit was commenced in the Maritime Court of Ontario against the Garland for supplies furnished the boat by parties residing in Canada, under which an attachment was issued, and the vessel was levied upon and ordered to be sold *pendente lite*, and at the sale thereof the Detroit Dry Dock Company purchased the steamer for $17,050, which sum it was alleged the company advanced on agreement with the complainant, thus making her total indebtedness to that company amount to the sum of $39,693; that the sum for which the Garland was thus sold, and which was paid into the Maritime Court of Ontario by the Dry Dock Company, was in excess of the claims proved in that court, and that the Dry Dock Company subsequently filed a petition to have the surplus proceeds, amounting to about $11,000, paid over to it as mortgagee, which sum it agreed to credit the complainant after payment of all expenses and costs for collecting the same; that subsequently on September 21, 1880, the complainant conveyed the Excelsior, subject to the mortgage aforesaid, to her son, John Horn, and shortly afterward an execution against him was levied upon the steamer, which was sold thereunder and purchased by the Detroit Dry Dock Company in the name of its secretary for the sum of $505, which was paid by the company under an agreement that it would hold it and the steamer Garland as security for the indebtedness of the complainant and advances made by the company, and would run and operate both vessels, and render an account of their earnings, and that when her indebtedness and advances were paid, return the steamers to the complainant; that the Detroit Dry Dock Company organized a corporation called the Detroit River Ferry Company, to which the steamers were conveyed, as trustee, to carry out the agreement with complainant, all of the stock in which corporation was subscribed for and held by the stockholders of the Detroit Dry Dock Company, and actually belonged to it; that shortly thereafter the Dry Dock Company purchased, for the sum of $23,000, the steamer For-

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tune, and caused her to be conveyed to the Detroit River Ferry Company; that this last named company and the Detroit and Windsor Ferry Company, engaged in a similar and rival business, were thereafter consolidated and incorporated under the laws of Michigan under the name of the Detroit, Belle Isle and Windsor Ferry Company, and the three steamers were conveyed to the consolidated company for the sum of $83,000 of its capital stock, the steamers Garland and Excelsior being estimated at $60,000, or 600 shares of the stock of the concern, which were held by the Detroit Dry Dock Company on the same terms it held the steamers Garland and Excelsior; that the par value of the $60,000 of stock was actually worth $70,000.

The bill also alleged that on June 27, 1881, the complainant entered into a written contract with the Dry Dock Company, which, after reciting in its preamble the history of the litigation growing out of the Garland's collision with the Mamie, and the transfer of the two steamers to the Detroit, Belle Isle and Windsor Ferry Company, and the desire of Sarah Horn to purchase a part of the stock held by the Dry Dock Company, stipulated that the Dry Dock Company agreed to sell and deliver to the complainant, her executors, administrators, or assigns, 600 shares of the capital stock of the Detroit, Belle Isle and Windsor Ferry Company, each of the par value of $100, and that it would advance and pay the complainant's attorneys their disbursements, expenses, and charges for services rendered, or to be rendered, in all suits, above referred to, growing out of the collision, and would also pay to the complainant or apply to her indebtedness whatever might be paid to the company by the Maritime Court of Ontario out of the proceeds of the steamer Garland, after deducting costs and expenses, and that in consideration of this agreement the complainant agreed to pay the Dry Dock Company the sum of $51,000 within three years from the date thereof, with annual interest at the rate of ten per cent, and also such sum or sums of money as might be paid by the company to her counsel, and any other sums that might be paid by the company on any decree or decrees that

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might be rendered against the complainant or the steamer Garland growing out of the collision with the steam yacht Mamie, all sums so paid to her counsel, or upon any decree or decrees in the pending suits were to be added to and form a part of complainant's indebtedness, which was to be paid within three years from the date of the agreement, with interest at the rate of ten per cent per annum; that 600 shares of stock were to be delivered upon the payment of such sums, and upon the failure to pay the same within the time provided the Dry Dock Company might sell enough of the stock, upon ten days' notice, to pay the same, but at not less than its par value. It was further agreed that any dividends received by the Dry Dock Company upon the stock should be applied upon the indebtedness. It was further stipulated that "the said Sarah Horn in consideration of the said agreement of the said Detroit Dry Dock Company does hereby release, discharge, convey, and quitclaim any and all interest, claim, or demand of any kind or nature whatsoever she may have, or pretend to claim to have, against said Detroit Dry Dock Company, to either of said boats or to the earnings or the proceeds of the sale, received or to be received by said Detroit Dry Dock Company, or by either of said ferry companies."

The bill also alleged that on the day following the execution of this agreement, her son-in-law, Albert R. Schulenberg, having falsely and fraudulently represented to her that the Detroit Dry Dock Company would not carry the 600 shares of stock for her account, suggested that his father (the appellee, Frederick Schulenberg) would advance the money to pay the Dry Dock Company, and would assume all liabilities which that company had assumed on behalf of the complainant, and would pay her the sum of $200 per month for three years for living expenses, and would take and hold the stock and manage the same, and at the end of three years deliver to her $25,000 of the par value of the stock, free and clear of all incumbrances; that the complainant relied upon this representation and agreed to that proposal; that Albert Schulenberg thereupon brought her a paper, signed by

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Statement of the Case.

Frederick Schulenberg; that upon reading it she discovered that it only referred to the monthly payments and was silent as to the $25,000 of stock which the said Schulenberg had agreed to return to her free of all incumbrances at the end of three years; that she refused to accept the paper on the ground that it did not represent the agreement of Frederick Schulenberg, and that her son-in-law Albert, upon her refusal, said that "it would make no difference, that his father would carry out the agreement to the letter," and thereupon placed the paper in a desk in the complainant's house, where it remained.

The bill then states that Frederick Schulenberg paid the complainant during the next three years the sum of $200 per month as agreed, but at the end of three years repudiated his agreement to return to her $25,000 of the par value of the stock; that she thereupon brought suit against him in the Circuit Court of the United States for the Eastern District of Michigan, and that it was held by that court that she had no remedy at law, and it directed a verdict in favor of the defendant Schulenberg, and for greater certainty reference was made to the files, records, and proceedings in that case.

The bill also sets out that Frederick Schulenberg held all of the 600 shares of stock, except 175 shares held by the Detroit Dry Dock Company; that in equity and good conscience the complainant was entitled — if the agreement with Frederick Schulenberg is valid — to the $25,000 of the par value of the stock and the earnings thereof; that all of the claims, suits, and proceedings against the steamer Garland and against the complainant, arising out of the collision, had been fully compromised and settled, and wholly released and discharged by the Dry Dock Company paying, with her approval, the sum of $3000 in full satisfaction of the same.

It was further alleged that the earnings of the 600 shares of stock were very large, and that Frederick Schulenberg and the Dry Dock Company received the same and refused to render the complainant any account of the amounts received by them from time to time as dividends thereon.

The prayer of the bill was that Frederick Schulenberg, in

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case his agreement with the complainant is held to be valid, may be decreed to transfer to her $25,000 of the stock free and clear of all incumbrances, and to account for and pay over to the complainant the earnings of that amount of stock since the time the same should have been transferred to her; and with the alternative prayer, in case said agreement with Schulenberg is held to be invalid, that he and the Dry Dock Company shall be declared trustees for her of 600 shares of the capital stock of the Detroit, Belle Isle and Windsor Ferry Company, and be required to account to her for the amount thereof, and all dividends received thereon to be applied on her indebtedness to the Dry Dock Company until the same shall have been discharged, and the balance paid over to her.

To this bill the Dry Dock Company filed its plea, averring that before the bill was filed it had transferred all of the 600 shares of stock which it held in lieu of its mortgages on the steamers Garland and Excelsior to the defendant, Frederick Schulenberg, as assignee of the complainant, under and in pursuance of the complainant's assignment to him, and that for a long time prior to the filing of the bill it had not, nor had it then, in its hands or under its control any of the 600 shares of stock, or any claim to or interest in the same, and that neither the Dry Dock Company nor the Detroit, Belle Isle and Windsor Ferry Company had any further interest in or connection with the case.

The defendant Frederick Schulenberg, for plea to the whole bill, set up the maritime proceedings against the steamer Garland at Windsor, Ontario, under which that steamer was sold and purchased by the Dry Dock Company; that thirteen suits were commenced by one James H. Cuddy, as administrator, in the District Court of the United States at Detroit, Michigan, against the steamer Garland to recover damages for loss of life occasioned by the collision mentioned in the bill with the steam yacht Mamie; that the Garland had been seized by the marshal of the district under process issued in said suits, and being in custody was duly appraised and bonded by and under the claim of the Detroit River Ferry Company, which was formed by the officers of the Detroit Dry Dock Company for the pur-

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pose, and to whom the Detroit Dry Dock Company had sold and conveyed the same; that these cases were put at issue and on March 5, 1883, one of them was brought on to be heard on pleadings and proofs, and that a decree was made by the District Court of the United States dismissing the libel with costs, from which Cuddy appealed to the Circuit Court of the United States, where the decree was affirmed with costs, from which last decree the libellant appealed to the Supreme Court of the United States; and that on October 14, 1880, James H. Cuddy, as administrator of the estates, respectively, of the persons lost by the collision, commenced thirteen suits at law in the Superior Court of Detroit against the complainant as owner of the Garland at the time of the collision, to recover the same damages as claimed in the admiralty cases. These suits were put at issue. On December 3, 1883, her attorney presented her petition to the District Court of the United States for a limitation of her liability as owner of the steamer Garland, and alleged therein the pendency of the thirteen suits at law in the Superior Court of Detroit, to which petition James H. Cuddy, as administrator, answered, and on February 22, 1885, the matter was submitted for decision. Subsequently the judge of the United States District Court signed a decree limiting her liability as owner of the Garland at the time of the collision to the sum of $60. Upon the filing of the petition in the Federal court limiting her liability, a plea *puis darrein continuance*, setting up said proceedings as a bar to the further prosecution of those suits in the state court, was entered in each of the pending cases, and the plaintiff in each and all of those suits, except in case No. 4410, failing to reply to the plea as required by the rules and practice of that court, a default was entered in each case and made absolute, and a judgment entered in favor of the complainant for costs in each of the cases; that the complainant, by her new attorney, declined to accept the benefits of the decree limiting her liability.

It was further averred in the plea that on August 24, 1884, the complainant, by her attorney, commenced a suit at law against the defendant in the Circuit Court of the United States, which was afterwards brought to trial and resulted

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in a verdict being rendered in favor of the defendant upon the ground, as stated in paragraph 11 of the bill, that the complainant had no remedy at law and that her proper remedy was in equity, and upon which verdict judgment was entered against the complainant in favor of the defendant Frederick Schulenberg.

It was further averred that on January 20, 1886, the complainant commenced suit for the same cause of action as in this case by filing a bill of complaint in the Superior Court of Detroit, in chancery, against the Dry Dock Company, the Detroit, Belle Isle and Windsor Ferry Company, and Frederick Schulenberg, seeking the same relief sought in this case and in her suit against defendant Schulenberg in the United States Circuit Court.

That on April 10, 1885, in the suit No. 4410 at law, against the complainant personally in the Superior Court of Detroit, by her consent a judgment was entered against her in favor of the complainant Cuddy, as administrator for $15,000 damages, and $270 costs, and by stipulation of her attorney defaults in the other twelve cases were set aside; that on the same day said judgment was entered the plaintiff therein filed affidavits separately against the Dry Dock Company and Frederick Schulenberg as garnishee debtors of Sarah Horn, the judgment debtor in the case. The plea further averred that writs of garnishment were duly issued out of said court, and served on the parties, who appeared and filed their disclosures thereto; that the foundation of the garnishment proceedings was the same, and based upon the same claim of indebtedness from the said parties to Sarah Horn, as was the foundation for and claim of indebtedness in this case; that the aforesaid litigation being pending and a judgment against the complainant being in full force and wholly unsatisfied, the issue in the garnishment proceedings came on to be tried before a jury duly impanelled, and the trial continued in progress on the 12th, 15th, 16th, and 17th days of March, when on March 17, and during the trial, all of the parties, together then and there, entered into a full and complete adjustment and settlement of all claims and

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demands, and of all litigation, and all of the conditions of the agreement were then and there performed, and in pursuance thereof there was paid in behalf of the Detroit Dry Dock Company and Frederick Schulenberg to Cuddy, as administrator, and to Sarah Horn, the sum of $3000, in settlement of all the claims against the garnishees, and that stipulations were signed and delivered discharging all of the judgments and decrees, and for the discontinuance of all of the pending suits as aforesaid; and that Cuddy and Sarah Horn then and there executed and delivered receipts and acquittances in the words and figures following:

"For a valuable consideration to me in hand paid by Sarah Horn, owner of the steamer Garland, I hereby acknowledge satisfaction of all claims and demands of every name and nature which I may have against said Sarah Horn, personally or as administrator of the several persons drowned July 22, 1880, through a collision between said steamer Garland and steamer Mamie, or which I may have against said steamer or persons who have become interested since said collision.

"Detroit, March 17, 1886. JAMES H. CUDDY,

"*Personally and as Administrator.*

"For a valuable consideration to us in hand paid we hereby acknowledge satisfaction of all claims and demands of every name and nature which we or either of us may have from the beginning of the world up to the present time against the Detroit Dry Dock Company, the Detroit River Ferry Company, the Detroit, Windsor and Belle Isle Ferry Company, Alexander McVittie, Albert R. Schulenberg, or Frederick Schulenberg or any of them.

"Detroit, March 17, 1886. JOHN HORN, JR.

"SARAH HORN."

The plea further averred that the receipts were in the possession of the defendant and ready to be produced, and that the stipulations were thereupon duly filed in the respective

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courts; and that the aforesaid suits in the District Court of the United States, in admiralty, and in the Supreme Court of the United States, and in the Superior Court of Detroit, in law and in chancery, were all discontinued without costs, and satisfaction of judgments and decree in the Circuit Court of the United States for the Eastern District of Michigan in favor of the defendant and the claimant of the steamer for costs; and in the Superior Court of Detroit in favor of said Cuddy for damages and costs, were duly entered. Whereupon the defendant pleaded the settlement and release in bar to the whole of the complainant's bill, and prayed judgment of the court whether he should make any further answer thereto, and further prayed that he be hence dismissed.

The complainant, by a general replication, put this plea in issue.

The agreement of the complainant with Frederick Schulenberg, referred to in the pleadings, as reduced to writing, was as follows:

"Know all men by these presents that I, Sarah Horn of Detroit, Michigan, for and in consideration of the sum of one dollar and of other valuable considerations, to me in hand paid by Frederick Schulenberg of St. Louis, Missouri, have assigned, sold, transferred, and set over, and do hereby assign, sell, transfer, and set over, to said Frederick Schulenberg all my interest, claim, or demand of, in, and to six hundred shares of stock of the capital stock of the Detroit, Belle Isle and Windsor Ferry Company, which are to be delivered to me upon payment of certain moneys mentioned in a written agreement made and dated on the twenty-seventh day of June, 1881, between the Detroit Dry Dock Company and myself, and also all my interest, claim, or demand of, in, and to the moneys payable to me by said agreement subject to the payment by said Frederick Schulenberg of the moneys by me agreed in said instrument to be paid to the performance by him of all the other terms and conditions of said instrument, reference being made thereto for greater certainty; and I do authorize and empower the said Frederick Schulenberg, his executors,

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administrators, or assigns, in my name, place, and stead, to demand and receive the said stock, money, or other claim or interest hereby transferred, and to otherwise enforce the performance of said agreement in all respects the same as I might have done, with power of substitution and revocation.

"In witness whereof I have hereunto set my hand and seal this twenty-eighth day of June, A.D. 1881, in duplicate.

"SARAH HORN. [SEAL.]

"Witness: John Horn, Jr."

Schulenberg, upon receiving this agreement, executed and delivered the following written acknowledgment:

"In consideration of the assignment by an instrument of this date, made by Sarah Horn to me all her interest in and claim to six hundred shares of the stock of the Detroit, Belle Isle and Windsor Ferry Company, agreed to be delivered to her by the Detroit Dry Dock Company in an agreement dated June 27, 1881, and also of interest in and claim to certain moneys mentioned in said agreement, and to be paid to her by said company, and which assignment is made subject to the performance of the conditions, payments, and other terms therein contained and by her to be performed or paid, I do hereby agree to pay to said Sarah Horn the sum of two hundred dollars ($200) per calendar month for three years from and after this date."

He thereupon gave notice of the assignment as follows:

"To the Dry Dock Company:

"Take notice that Sarah Horn has made an assignment to me, of which the above is a duplicate original, and I claim all the rights to the stock and moneys thereby assigned to me which Mrs. Horn was entitled to under her agreement with you, it being my intention to carry out the terms of the agreement on her part to be performed.

"June 28, 1881.

"FREDERICK SCHULENBERG."

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Argument for Appellant.

Mr. F. A. Baker for appellant.

I. The case presented by complainant's bill is a simple and meritorious one.

Sarah Horn's right to redeem the 600 shares of stock in the Detroit, Belle Isle and Windsor Ferry Co. was a very valuable right of property. Any one at all familiar with the great beauty, and usefulness to the people of the city of Detroit and vicinity, of the Detroit River, with Belle Isle, and its park, Lake St. Clair, and the St. Clair Flats on the north, and Grosse Isle, Sugar Island, Bois Blanc, and Lake Erie on the south, can readily understand the successful and lucrative nature of the ferry and excursion business in which the complainant and the corporations who succeeded her were engaged.

Under negotiations between complainant and Frederick Schulenberg, which were conducted by Albert Schulenberg, who is the son-in-law of one of the parties and the son of the other, the complainant assigned her rights under the agreement of June 27, 1881, to Frederick Schulenberg. In virtue of this assignment Frederick Schulenberg redeemed the 600 shares of stock and became the owner and holder thereof. The complainant shows that the agreed consideration for this assignment was $200 a month for three years, and the return to her at the end of the three years of $25,000 of the stock at its par value.

Frederick Schulenberg, in his petition for removal to the Federal court, denies that he was to return any of the stock to complainant; but no such defence is interposed to the bill by plea or answer, so that the complainant's case stands on this record as confessed.

It is also worthy of note, that Frederick Schulenberg was not sworn as a witness in his own behalf, and that although Albert Schulenberg was sworn as a witness for his father, he makes no denial of the complainant's case on the merits as stated in her bill.

As far as the merits are concerned, therefore, the complainant is entitled to a decree, and the only question is whether the plea of accord and satisfaction can be sustained.

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Argument for Appellant.

II. Under the proofs as they stand in this record, the court should hold that the plea of accord and satisfaction is not sustained.

The receipts of March 17, 1886, do not mention the $3000, or any other specific sum or thing as their consideration. On the contrary, they simply recite that "For a valuable consideration," etc.

It is clear that it is competent to explain a receipt of this kind by oral proof showing what the real consideration actually was, and that a mere receipt is always subject to explanation by parol evidence.

This doctrine is distinctly recognized by this court in the second subdivision of the opinion of the court, as prepared by Mr. Justice Brown, in *Fire Insurance Association* v. *Wickham*, 141 U. S. 564, in which the learned justice cites the following cases approvingly: *Simons* v. *Johnson*, 3 B. & Ad. 175; *Lawrence* v. *Schuylkill Nav. Co.*, 4 Wash. C. C. 562; *Payler* v. *Homersham*, 1 M. & S. 423; *Jackson* v. *Stackhouse*, 1 Cow. 122; *S. C.* 13 Am. Dec. 514; *Grumley* v. *Webb*, 44 Missouri, 444; *Price* v. *Treat*, 29 Nebraska, 536; *St. Louis, Wichita &c. Railroad* v. *Davis*, 35 Kansas, 464.

Inasmuch as these receipts do not purport to give the consideration on which they were based, they are not even *prima facie* evidence thereof, and it is just as competent for the complainant to prove that the consideration included a promise to her, as it is for the defendant to prove that the agreed consideration was the $3000, actually paid.

The receipt signed by Sarah Horn left the question of the actual consideration open, and subject to parol proof, so that she is in no sense concluded thereby.

The plea of accord and satisfaction, therefore, cannot be sustained, because the party having the affirmative on that issue has not sustained the plea with a preponderance of evidence.

The minds of the parties did not meet, and the supposed agreement to compromise for that reason fails. *Utley* v. *Donaldson*, 94 U. S. 29, and cases cited.

And further, Frederick Schulenberg was not a party to the

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agreement. There is no proof in this record that he or any one authorized to represent him, had anything to do with the settlement, or that he was in any way a party to it, or bound by it. The case calls, therefore, for an application of the familiar doctrine that one party to a contract is not bound unless the other is.

An accord and satisfaction would certainly have to be binding as to both of the parties, in order to be binding at all; and in fact it is the rule as to all contracts that there must be mutuality of obligation. *Dorsey* v. *Packwood*, 12 How. 126.

Mr. C. E. Warner, (with whom was *Mr. Levi T. Griffin* on the brief,) for appellees.

Mr. Justice Jackson, after stating the case, delivered the opinion of the court.

The garnishment proceedings on the part of Cuddy, administrator, against Sarah Horn, as the principal debtor, and the Dry Dock Company and Frederick Schulenberg, as garnishees, regularly taken and prosecuted under the statutes of Michigan, were designed to reach and subject to the payment of Cuddy's confessed judgment against Sarah Horn, the claim and demand which she seeks to enforce in the present case. So that the garnishment proceeding involved directly the liability of the Dry Dock Company and of Frederick Schulenberg to the complainant for either $25,000 in stock, which she alleged Schulenberg was to return to her, or any other credits in their hands in her favor.

The proofs taken in the case clearly and fully establish the truth of the matters set up and alleged in the plea, including the complainant's foregoing receipt in full satisfaction of all claims against the Dry Dock Company and Frederick Schulenberg.

As a part of the documentary proof there was produced a stipulation filed in the cause of Sarah Horn against Frederick Schulenberg, in the United States Circuit Court for the Eastern District of Michigan, which cause involved

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the same claim upon the part of the appellant against the appellee Schulenberg as is presented in the present case. The stipulation was as follows: "It is hereby stipulated that the bill of exceptions settled and filed in this cause shall be withdrawn, and that the judgment entered herein in favor of defendant shall stand as the final determination of the issue, and that full satisfaction of the same for costs may be entered." This, with other documentary and parol evidence, fully established the truth of the plea, and the plea being thus sustained the court thereupon dismissed the bill. It could not have done otherwise under the well-settled rules of chancery pleading and practice.

In chancery proceedings a plea in bar may be set down for hearing by the complainant upon its sufficiency, or it may be replied to and put in issue. If the latter course is pursued, and the plea is sustained, then, according to the English chancery practice, which formerly prevailed in this court, the bill must be dismissed, without reference to the equity arising from any other facts stated in the bill. *Hughes* v. *Blake*, 6 Wheat. 453, 472; *Rhode Island* v. *Massachusetts*, 14 Pet. 210, 257. This practice has now been modified by Equity Rule 33 of this court, which is as follows: "The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him." See *Farley* v. *Kittson*, 120 U. S. 303, 314, 315; *Pearce* v. *Rice*, 142 U. S. 28, 41, 42. But even under this rule, when the plea meets and satisfies all the claims of the bill, it ought, in law and equity, to avail the defendant so far as to require a final decree in his favor.

In the taking of proof upon the issue raised by the replication to the plea, the appellant attempted to show that in addition to the $3000 paid by the appellees in settlement and compromise of all claims and demands against them, or either of them, upon the part of the appellant as already stated, it was understood and agreed that Albert R. Schulenberg, her son-in-law, was to pay her $50 a month and turn over to her

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$25,000 of the stock of the Detroit, Belle Isle and Windsor Ferry Company, whenever he should acquire the same from his father, Frederick Schulenberg; and that this part of the agreement had not been performed. This contention is not established by the testimony in the case, but suppose it was? It could not affect the result or show that there was error in the dismissal of the bill which followed from sustaining the plea, for no such question was ever raised or presented by the pleadings.

Again, it is urged by counsel for the appellant that her receipt of March 17, 1886, executed upon the making of the compromise, is open to explanation by parol proof for the purpose of showing what the real consideration was under the rule recognized and applied in *Fire Ins. Co.* v. *Wickham*, 141 U. S. 564. While this may be true in respect to receipts generally, the fact is overlooked that the issue made by the replication was simply the existence of the receipt as set forth in the plea. The complainant, neither in her bill nor in her replication to the plea, raised any question as to the correctness of the receipt executed by her. Her replication, as already stated, simply put in issue the truth of the plea, and that being established, the dismissal of the bill necessarily followed under the authorities referred to. Her claim of a mistake in the receipt was wholly foreign to the issue which she, by her pleadings, had presented for the determination of the court. No such question as she now raises was properly presented in the court below, or is available here.

It is further urged on her behalf that mutual consent of the parties was necessary to the compromise contract, and that there was no such mutuality, inasmuch as she supposed that she was to receive $50 a month from Albert R. Schulenberg. But this is equally unavailable, if such a mistake were shown to exist, for the simple reason that it was not put in issue in any shape by the pleadings. While an accord and satisfaction may be set aside, if it is shown that the parties to the transaction were mutually mistaken in regard to the material facts, such mistake must be set up by proper pleading. It is not available where it is neither averred in the bill, nor referred

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to in a plea in bar and a general replication thereto, which merely puts in issue the truth of the plea.

There is no error in the judgment of the court below, and the same is, accordingly,

Affirmed.

GILES v. HEYSINGER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 152. Argued December 7, 1893. — Decided December 18, 1893.

When, in a suit in equity for the infringement of letters patent, the court below makes an interlocutory decree in plaintiff's favor, and then entertains a motion for a rehearing and receives affidavits in support of it, and denies the motion, this court does not feel itself at liberty to consider those affidavits.

The first claim in letters patent No. 218,300, issued August 5, 1879, to William Mills and Christian H. Hershey, for an improvement in hair-crimpers, viz.: "A hair-crimper consisting of a non-elastic metal core C, and braided covering A, said covering A being cemented to said core C throughout its entire length, substantially as described," is void for want of novelty.

This was a bill in equity brought by Heysinger and one Christian H. Hershey, now represented by the administrator of his estate, against the appellants, trading under the name of Noyes, Smith & Co., to recover damages for the infringement of letters patent No. 218,300, issued August 5, 1879, to William Mills and Christian H. Hershey, for an improvement in hair-crimpers.

In their specification the patentees state that "this hair-crimper is intended to be applied to the hair in the manner of the crimping-papers formerly in common use, the ends being turned under out of sight, and the hair retained by the folds thus made."

"It consists, essentially, of a strip of soft, non-elastic metal, preferably flat, covered with a fibrous coating, cemented thereto, so that when cut into proper lengths for use the ends

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will not fray out, but remain the same into whatever number of pieces the crimper may be divided, thus rendering it specially adapted for use with children, where crimpers of different lengths are often required, while at the same time greatly simplifying and cheapening the cost of manufacture."

The crimper consists of a core of what is known as "gardeners' lead," which is passed in long strips through a liquid cement known as dextrine, and is then wound about by a braid of fibrous covering, and the adhesive material, taken up in the passage through it of the leaden core, is thus interposed between the fibrous covering and the soft metal core, making an adhesion between them, while leaving the outer surface of the braid soft and unsaturated. "Were the fibrous surface thoroughly saturated with adhesive matter, the crimper would be comparatively useless, as the least moisture in the hair would cause its adhesion thereto." The article is manufactured in long strips which are laid away and dried, after which they are run through a cutting machine, which cuts the strip into pieces of equal length, laying them out in dozens, which are then bundled and boxed for the market.

The first claim of the patent — the only one charged to have been infringed — reads as follows: "A hair-crimper consisting of a non-elastic metal core C and braided covering A, said covering A being cemented to said core C throughout its entire length, substantially as described."

Upon the hearing in the court below, a final decree was entered for $360.85 with costs, from which decree defendants appealed to this court.

Mr. John J. Jennings for appellants.

Mr. Augustus B. Stoughton for appellees.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

This case was defended upon the ground that one Gilbert H. Blakesley, the real defendant in the case, long before this

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patent was issued, manufactured hair-crimpers in substantially the manner specified in the patent. The substance of the testimony in this connection is that in the latter part of 1875, one Julius Wright, whose principal business was the manufacture of garters at Bristol, Connecticut, began the manufacture of hair-crimpers by rolling a sheet of copper to the proper thickness, putting it upon a reel, and braiding it with silk. "Then," says he, "I had this taken off a reel and stretched out on a bench, and at certain lengths that I wanted to cut the crimps I used the dextrine with a brush for the same purpose that we did for cutting up the garter, that is, to assist in cutting up. Then those that I made, I made a little brass tip, as I called it, which I put on to give the crimper a finish, or ornament, whichever might be proper." He states the object of applying the cement to have been "to adhere the silk to the metal, and stiffen it, so as to cut it." He was engaged in this way for one or two months, and made up about thirty gross of crimpers. The dextrine was laid on at intervals of about two and a half inches, and the advantage of using it seems to have been to facilitate the cutting of the crimpers at these points, and providing them with a silver-plated clip at each end. It was not claimed that Wright cemented the braided covering to the core "throughout its entire length," as specified in the first claim of the patent.

He further testified that Blakesley took up the business in the spring of 1876, by passing the strips of metal up through a dish of dextrine, after which it was braided with silk. He says the metal was not covered when it entered the dish, but it looked wet and discolored as it emerged, and that the effect of passing the strip through the cement or dextrine, and then applying the silk covering, would be to secure the covering to the metal. Blakesley stated the process as follows: "I directed a plain strip of brass through a dish of dextrine provided with a roller journalled in a dish, thereby to immerse the strip, passing it to the braider, while wet with cement, to which the silk cover adhered throughout the length of the strip. I then cut them up at any point I desired." He judges that he made some fifty gross or more in this way, and then

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changed his plan by making them with a double covering. "I first covered the plain strip of metal with cotton, the strip being dry. I then conducted the cotton-braided strip through the silk braider, applying a cover of silk. The cotton-covered strip was conducted through a dish of dextrine under a roller journalled in the dish, thence to a pair of stripping rolls situated between the dish and the braider. This dextrine saturating the cotton thoroughly throughout its length, the stripping rolls depriving it of the surplus cement, leaving it wet and thoroughly saturated, and wet enough to receive the silk covering, and cement it, so that all three — core, cotton cover, and silk cover — were cemented together. They were cut up and packed as before."

The court below held, with regard to the double-cover process used by Blakesley, that the braided covering was immersed in the dextrine, "not in order to cement it to the core, but to enable the material to be cut without fraying out. The adhesion of the strands together, and not their adhesion to the core, was the object he had in view." The court, however, regarded the theory that Blakesley made crimpers also by immersing a strip of metal in dextrine and then covering it, as refuted by the omission of both Blakesley and Wright to mention the fact in their affidavits used to oppose a motion for a preliminary injunction, as those affidavits purported to give a full history of the manufacture of crimpers by Blakesley, "and the omission to state what was so important, if true, is significant."

Acting upon this theory, the court directed an interlocutory decree for the plaintiffs. Defendants thereupon moved immediately for an order to reopen the case for the admission of additional testimony bearing upon the question of anticipation, and for a rehearing; and presented seven affidavits in support of Blakesley's testimony concerning the manufacture of crimpers by passing a bare strip of metal through the dextrine before the silk braid was applied; and also the affidavit of his counsel, explaining the omission of the mention of this particular in the affidavits of Wright and Blakesley, read in opposition to the motion for a preliminary

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injunction. The court denied a rehearing, and the case was referred to a master, who proceeded to take testimony in respect to the damages, and submitted a report, upon which a final decree was entered. Under these circumstances, we have not felt at liberty to consider the affidavits for a rehearing.

But assuming that the court was correct in its conclusion that the testimony of Wright and Blakesley, with respect to the process of immersing the bare strip of metal in the dextrine, and then covering it, should be disregarded, by reason of their omission to mention the fact in their affidavits to oppose the injunction, the question still remains whether the process about which they did testify, and which it is admitted Blakesley did adopt, was not a substantial anticipation of the Mills and Hershey patent. This, which is known as the double-cover process, consisted in covering the plain strip of metal with cotton, and conducting the strip so covered through a dish of dextrine under a roller journalled in the dish, and thus saturating the cotton thoroughly throughout its length; thence to a pair of stripping rolls, which deprived it of the surplus cement, when the cover was braided on, so that, as he states, "all three — core, cotton, cover and silk cover — were cemented together." Blakesley states that the cotton strands did not make as compact a braid as silk, but left the meshes somewhat open, so as to allow the cement to circulate more freely through the covering. If, as he states to have been the case, the saturation of the cotton was so thorough that all three — core, cotton cover, and silk cover — were cemented together, it is difficult to see why this process did not cover everything that is claimed for the Mills and Hershey patent. The advantage of cementing the braid to the core throughout its entire length is stated in their patent to be "so that when cut into proper lengths for use the ends will not fray out, but remain the same into whatever number of pieces the crimper may be divided," while the outer surface of the braid is left soft and unsaturated.

This was precisely the object sought to be accomplished, though for a temporary purpose, by Wright, in his first experi-

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ments, by applying dextrine to the braided covering at intervals of two or three inches, and by Blakesley in the several processes used by him, including the one which is charged to be an infringement, and which consists in enclosing the metal core in long strips of paper passed through a bath of dextrine, before the braided covering is applied. But whether Blakesley applied the dextrine to the bare metal in the manner described in the Mills and Hershey patent, or to the metal after it was covered with the cotton braid, makes apparently little practical difference with respect to fraying out, and was a matter which rested in the judgment of the manufacturer. If either plan were known, the adoption of the other would involve no invention, the dextrine in both cases being used for the same object, namely, to prevent the silk braid from fraying at the point where it is cut. It was a matter of simple mechanical skill to determine whether that object were better accomplished by running the bare metal or the covered metal through the dextrine before the outer braid of silk was applied. If the meshes of the cotton were loose or open, the adhesion of the core would be amply sufficient to prevent the fraying out, which it was the object of the patent to accomplish. The bath of dextrine was the essential feature of both devices, and, even if the double cover were less efficient than the other, it required no exercise of the inventive faculty to omit the cotton cover and immerse the bare metal.

It is evident that if Mills and Hershey had been the first to use the process described in this patent of immersing the bare metal in a bath of dextrine and then covering it with a fibrous coating, the double-cover process of Blakesley would have been an infringement. The intervention of a loose cotton covering between the outer braid and the bare metal would have been treated simply as an evasion.

In an examination made of the plaintiffs' and defendants' exhibits put in evidence in this case it appears in fact there is very little adhesion between the covering and the core in the plaintiffs' device, and none at all in the defendants', though it is possible this may be due to their age. Such adhesion as there is in plaintiffs' crimpers seems to be due rather to the

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pressure of the braid upon the core than to the use of an adhesive material.

The decree of the court below must be

Reversed and the case remanded with directions to dismiss the bill.

HAMMOND v. CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

HAMMOND v. GORDON.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

Nos. 937, 938. Submitted December 11, 1893. — Decided December 18, 1893.

The court follows *Hammond* v. *Johnston*, 142 U. S. 73, on a substantially similar state of facts, and holds that the ruling of the state court was broad enough to maintain the judgment, without considering the Federal question.

MOTION to dismiss. By stipulation of counsel in No. 938, both cases were heard on the printed record in No. 937, it being "agreed that for all purposes of trial . . . the records in both cases are identical."

The Supreme Court of Missouri in its opinion in that case said: "The facts of the case, so far as they are material to the questions raised in this court, are these:

"Joseph Hunot claimed a head-right, under a concession dated in 1802, for 800 arpens of land in what is now New Madrid County. In 1810 he conveyed the land to Joseph Vandenbenden. The claim was presented to the first board of commissioners for confirmation, but the board rejected and disallowed it on the 31st January, 1811. It was presented again to Frederick Bates, recorder of land titles, and by him approved and recommended for confirmation on the 1st November, 1815. The claim was then confirmed by the act of Congress of April 29, 1816. Prior to the confirmation

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Vandenbenden conveyed the land to Rufus Easton by a deed dated the 4th November, 1815. It is conceded that the effect of this confirmation by Congress was to vest the legal title to the land in Easton.

"The land having been injured by earthquakes, Easton sought to exchange it for other lands under the provisions of the act of Congress of February 17, 1815, entitled 'An act for the relief of the inhabitants of the county of New Madrid, in the State of Missouri, who suffered by earthquakes.' On the 12th August, 1816, the recorder of land titles issued a certificate stating that Joseph Hunot or his legal representatives were entitled to locate 480 acres under the provisions of said act. This certificate is known as New Madrid certificate No. 161.

"On the 16th June, 1818, Rufus Easton, as the legal representative of Hunot, made application to locate the certificate on 480 acres of land, giving a general description of the land in the application. The deputy surveyor surveyed the land, and on the 23d June, 1819, certified this survey to the surveyor general. This survey was designated and is known as survey No. 2500. The surveyor general transmitted this survey — and the plat made a part of it — to the recorder on the 8th January, 1833. The latter recorded the same on the 2d February, 1833, and on that day issued a patent certificate to Joseph Hunot or his legal representatives for the 480 acres. This patent certificate was delivered to Peter Lindell, and it was forwarded to the General Land Office. Conflicting claims were interposed, so that the patent was not issued until the 13th August, 1859.

"As has been stated, Easton signified his desire to locate his certificate on the land on the 16th June, 1818, and the survey and plat were made on the 23d June, 1819, but the plat and survey were not filed with the recorder until early in January, 1833. Rufus Easton, by his warranty deed, dated the 29th September, 1823, acknowledged by him and his wife on the 9th October, 1823, and recorded on the 9th February, 1824, conveyed 240 of the 480 acres to Samuel Hammond. This deed contains a recital that it was made 'in consideration of $1583 to him in hand paid by said Samuel Hammond and pursuant

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to the conditions of a certain bond executed by the said Rufus Easton to said Samuel Hammond and James I. Wilkerson, dated September 3d, 1818.' On July 10, 1819, Easton conveyed the residue of the 480 acres to William Stokes. There is evidence that Hammond went into possession under his title bond and remained in possession for several years. On the 8th October, 1823, the sheriff sold the 240 acres to Richard Relf and Beverly Chew by virtue of an execution issued upon a judgment against Samuel Hammond, and executed to them a deed dated the 4th November, 1823. Relf and Chew conveyed the land to Peter Lindell in March, 1840. Lindell also held a deed to the land from Hunot, dated in 1834, and it appears that Lindell took possession at that date and continued his possession until his death, in 1861. The lot in question is part of the 240 acres, and was set off to one of the heirs of Lindell in the partition of that estate. The plaintiffs have acquired all the title of such heir by deeds in due form.

"The defendants claim title by deeds from the heirs of Samuel Hammond, obtained since 1870. They got possession of the land in 1879 by virtue of an execution on a judgment in an ejectment suit against the tenant of the heir of Lindell, to whom the lot had been assigned in the partition suit. The bank brought this suit to regain possession in 1882.

"1. From the foregoing statement it will be seen that all parties to this suit claim under Samuel Hammond, the defendants through the heirs of Hammond, and the plaintiffs under the sheriff's deed. The title is with the defendants, unless the sheriff's deed divested Samuel Hammond of his interest in the land. . . . We hold that the bond recited in the deed vested in Hammond an interest in the land which was subject to sale under an execution.

"2. The defendants insist, in the next place, that there was not a particle of title, legal or equitable, out of the United States and in Hammond at the date of the execution sale, and that he had nothing which could be sold, because the surveyor general did not file the survey with the recorder until early in 1833, which was about ten years after the land was sold under the execution. . . . The claim that the doctrine of rela-

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tion can have no application to a New Madrid location prior to the return of the survey to the recorder is, in our opinion, not well founded and not supported by any of the authorities cited to prove that proposition. Right and justice calls for the application of the rule in this case, and no reason is seen why it should not be applied.

"The foregoing objections to the sheriff's deed were considered in the case of *Hammond* v. *Johnston*, 99 Mo. 198, but we have travelled over the ground again in view of the great value of the property involved and the earnest arguments made on the hearing of this case.

"3. There is another objection to the sheriff's deed not made or considered in the Hammond-Johnston case, and that is this, that it is void because the execution issued out of the Supreme Court instead of out of the circuit court. . . . We hold that the sale was and is valid in this collateral proceeding, and in saying this we assume that it appears from the sheriff's return that the first piece of property sold brought more than enough to pay the costs, and that it appears from that return that the property in question was the second piece sold.

"With the foregoing conclusions it follows that the judgment should be, and it is, affirmed."

The judgment thus affirmed was in accordance with the judgment of the Supreme Court of the State of Missouri which was before this court in *Hammond* v. *Johnston*, 142 U. S. 73.

Mr. J. B. Henderson, for the defendants in error, moved to dismiss both actions upon the ground that "the whole question of title, in the judgment of the Missouri court, turned on the validity of the sheriff's sale," which was "a question purely of state law and not reviewable in this court."

Mr. D. T. Jewett and *Mr. Leverett Bell* opposing.

THE CHIEF JUSTICE: The writs of error are dismissed upon the authority of *Hammond* v. *Johnston*, 142 U. S. 73.

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In re SWAN, Petitioner.

ORIGINAL.

No. 10. Original. Argued November 20, 1893. — Decided December 18, 1893.

A writ of *habeas corpus* cannot be used to perform the office of a writ of error or appeal.

When a person is imprisoned under a judgment of a Circuit Court which had no jurisdiction of the person or of the subject-matter, or authority to render the judgment, and no writ of error or appeal will lie, then relief may be accorded by writ of *habeas corpus*.

S. claiming to act as a constable in the State of South Carolina, and to act under the statute of that State touching intoxicating liquors known as the Dispensary Act, seized without warrant and carried away a cask of liquor which had been brought into the State by a receiver operating a railroad under authority of the Circuit Court of the United States for that district, and was held by him as an officer of that court, awaiting its delivery to the consignee. The receiver applied to the court which appointed him, setting forth the facts, and praying that S. be attached and punished for contempt, and be required to restore the property. A rule to show cause issued and S. appeared and made answer. The court adjudged him to be guilty of contempt, ordered him to be imprisoned until he return the property, and when that should be done that he be imprisoned for a further period of three months, and until he should pay the costs.

Held,

(1) That the Circuit Court had jurisdiction;

(2) That its determination that the act of S. was illegal, and that he was in contempt, was not open to review in this proceeding;

(3) That it was not necessary to determine whether he could be required to pay the costs, as he had not yet restored the goods, nor suffered the three months' imprisonment.

The possession of property by the judicial department, whether Federal or state, cannot be arbitrarily encroached upon, without violating the fundamental principle which requires coördinate departments to refrain from interference with the independence of each other.

By an order of the Circuit Court of the United States for the District of South Carolina in the case of *F. W. Bound* v. *The South Carolina Railway Company and others*, Daniel H. Chamberlain was appointed receiver of the railway company,

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and all of its property was placed under his care and management and protected by injunction. In the operation of the railroad as a common carrier, there was delivered to the receiver April 12, 1893, a barrel of liquor shipped by citizens of North Carolina from Statesville in that State, and consigned to their agents in Charleston, South Carolina. By reason of some confusion arising over the bill of lading, or from the markings on the barrel, there was difficulty in discovering the consignees, and the barrel was stored in the warehouse of the railroad company awaiting the result of an investigation in that particular.

An act of the general assembly of South Carolina, commonly called the Dispensary Law, and entitled "An act to prohibit the manufacture and sale of intoxicating liquors as a beverage within this State, except as herein provided," was approved December 24, 1892, and by its terms was to go into full operation July 1, 1893. Acts South Carolina, 1892, No. 28, p. 62.

On the first of August, 1893, while the matter of the ascertainment of the consignee was being investigated and the barrel was in the warehouse of the receiver, freight unpaid, one C. B. Swan entered the warehouse, seized the barrel, took it out of the custody of the receiver, and deposited it in the jail of Charleston County, in the care of the sheriff. Swan showed no authority either from the consignee or the consignor of the goods, and produced no warrant by virtue of which the seizure was made. When questioned by the receiver, the sole authority referred to by him was his commission as a constable of the State. His suspicions had been excited respecting this barrel, it having been, presumably from necessity, removed from one part of the floor of the warehouse to another, and he acted on his suspicions. It was admitted that he took the course he did of his own motion without instructions from any one in the legal department of the State, and probably without instructions from any other person. After the seizure the goods remained in the place where deposited by Swan without any proceeding or application whatever until on August 7, 1893, the receiver filed his petition in the Circuit Court in the case in which he was appointed, setting forth the

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Statement of the Case.

facts and praying that Swan be attached and punished for contempt of court in seizing the goods without warrant, and that he be compelled to restore them to the receiver's custody for delivery to the consignee. A rule to show cause was accordingly entered, to which Swan made answer, disclaiming any purpose to commit contempt of court, but justifying the seizure under the Dispensary Act, and making no offer to restore the goods. The court after full hearing ordered that the rule be made absolute, and committed him to the custody of the marshal to be imprisoned in the jail of Charleston County until he returned, "to the custody of the receiver, the barrel taken by him from the warehouse without warrant of law. And when that has been surrendered that he suffer a further imprisonment thereafter in said county jail for three months and until he pay the costs of these proceedings."

In its opinion, the court, (Simonton, J.,) after stating the facts, said: "Were this a simple case of interference with property in the hands and custody of this court, without notice to it, and without action on its part, its settlement would be easy. Were it even based upon a charge of violation of the law on the part of the receiver, and sustained by a mandate issuing from any proper authority, the court would not be slow to believe that the manner of the execution of the mandate arose from inadvertence, and would lend its aid to an investigation of the charge, and a due execution of the law. As a common carrier, the receiver is bound to respect and obey the laws of the State. He and the court from whom he holds his appointment are servants of the law, exceptionably bound to pay it the utmost deference and respect. But the real issue in this case is vastly more important than an interference with property in the hands of the court. It is far reaching in its consequences, and concerns, not only the receiver, but every other citizen. Has any constable the right, without warrant, to search premises, and to seize property, when he suspects that a violation of the law is intended?"

The various sections of the Dispensary Act were then considered and the result reached that a constable had no authority to so search and seize under the terms of the act, on general

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principles, or under the constitution of South Carolina, and it was said in conclusion:

"In the case now before us there is not even the excuse for haste. The goods were stored and kept in a warehouse, not at a place for sale. No concealment whatever was practised. In his answer the respondent says that for several days he saw the package, and watched it. Any notification to this court would have absolutely secured him from any removal of it. Within his reach, at any hour of the day, he could have gone before any justice or judge, and could have obtained, or at least could have sought, a warrant. The process of law was within his reach. Even when he searched and seized the package, he openly disregarded the law. For eight days he remained inactive, taking no steps whatever to justify, support, or legalize his action. It does not appear even that he reported it to any one. His contempt of private rights went far beyond his disregard of the existence and authority of this court."

Swan, having been committed, presented his petition for the writ of *habeas corpus*, and a rule having been entered thereon, and a return having been duly made thereto, the application was heard by this court upon the petition and return, and the accompanying exhibits, which included the opinion, now reported in 57 Fed. Rep. 485.

By the first section of the Dispensary Act it was provided that after July 1, 1893, the manufacture, sale, barter, or exchange, or the keeping or offering for sale, barter, trade, or exchange, within the State, of intoxicating liquors, should be regulated and conducted as provided in the act.

The second section provided for the appointment of a commission to purchase all intoxicating liquors for lawful sale in the State and to furnish the same to persons designated as dispensers thereof, to be sold as prescribed.

In all purchases or sales made by the commissioner it was made his duty to cause a certificate to be attached to each and every package, "and without such certificate any package containing liquors which shall be brought into the State, or shipped out of the State, or shipped from place to place within

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the State by any railroad, express company, or other common carrier, shall be regarded as intended for unlawful sale."

The following are applicable sections of the act, some immaterial parts being omitted:

"SEC. 22. All places where intoxicating liquors are sold, bartered or given away in violation of this act, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale, barter or delivery in violation of this act, are hereby declared to be common nuisances; and if the existence of such nuisance be established, either in a criminal or equitable action, upon the judgment of a court, or judge having jurisdiction, finding such place to be a nuisance, the sheriff, his deputy, or any constable of the proper county or city where the same is located, shall be directed to shut up and abate such place by taking possession thereof, if he has not already done so, under the provisions of this act; and by taking possession of all such intoxicating liquors found therein, together with all signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining such nuisance; and such personal property so taken possession of shall, after judgment against said defendant, be forthwith confiscated to the State. . . .

"SEC. 23. The attorney general, his assistant, the circuit solicitor, or any citizen of the county where such nuisance exists, or is kept or maintained, may maintain an action in the name of the State to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action in the usual manner of granting injunctions, except that the affidavit or complaint, or both, may be made by the attorney general, his assistant or the solicitor of the circuit, upon information or belief, and no bond shall be required; and if an affidavit shall be presented to the court or judge, stating or showing that intoxicating liquors, particularly describing the same, are kept for sale, or are sold, bartered or given away on the premises, particularly describing the same, where such nuisance is located, contrary to law, the court or judge shall at the time of granting the injunction issue his orders, commanding the officer serving the writ of injunction, at the time

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of such service, diligently to search the premises and carefully to invoice all the articles found therein, used in or about the carrying on of the unlawful business, for which search and invoicing said officer shall receive the fees now allowed by law for serving an injunction. If such officer upon such search shall find upon any such premises any intoxicating liquor, or liquors of any kind, in quantity going to show it was for the purpose of sale or barter, he shall take the same into his custody and turn over the same to the sheriff of the county, who shall securely hold the same to abide the final judgment of the court in the action (the expenses for holding to be taxed as part of the costs of the action); and such officer shall also take possession of all personal property found on such premises, and turn over the same to the sheriff of the county, who shall hold the same until the final judgment in the case. The finding of such intoxicating liquors on such premises, with satisfactory evidence that the same was being disposed of contrary to this act, shall be *prima facie* evidence of the nuisance complained of. Liquors seized as hereinbefore provided, and the vessels containing them, shall not be taken from the custody of the officer in possession of the same by any writ of replevin or other process while the proceedings herein provided for are pending; and final judgment in such proceedings in favor of the plaintiff shall, in all cases, be a bar to all suits against such officer or officers for recovery of any liquors seized, or the value of the same, or for damages alleged to arise by reason of the seizure and detention thereof. Any person violating the terms of any injunction granted in such proceedings shall be punished for contempt. . . .

"SEC. 24. It shall be the duty of the sheriffs, deputy sheriffs and constables having notice of the violation of any of the provisions of this act to notify the circuit solicitor of the fact of such violation, and to furnish him the names of any witnesses within their knowledge by whom such violation can be proven. . . .

"SEC. 25. No person shall knowingly bring into this State, or knowingly transport from place to place within this State, by wagon, cart or other vehicle, or by any other means or

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mode of carriage, any intoxicating liquors with the intent to sell the same in this State in violation of law, or with intent that the same shall be sold by any other person, or to aid any other person in such sale, under a penalty of five hundred dollars and costs for each offence, and in addition thereto shall be imprisoned in the county jail for one year. In default of payment of said fine and costs the party shall suffer an additional imprisonment of one year. Any servant, agent or employé of any railroad corporation, or of any express company, or of any persons, corporations or associations, doing business in this State as common carriers, who shall remove any intoxicating liquors from any railroad car, vessel or other vehicle of transportation, at any place other than the usual and established stations, wharves, depots or places of business of such common carriers within some incorporated city or town, where there is a dispensary, or who shall aid in or consent to such removal, shall be subject to a penalty of fifty dollars and imprisonment for thirty days for every such offence: *Provided*, That said penalty shall not apply to any liquor in transit when changed from car to car to facilitate transportation. All such liquors intended for unlawful sale in this State may be seized in transit, and proceeded against as if it were unlawfully kept and deposited in any place. And any steamboat, sailing vessel, railroad, or express company, or other corporation, knowingly transporting or bringing such liquors into the State shall be punished upon conviction by a fine of five hundred dollars and costs for each offence. Knowledge on the part of any authorized agent of such company shall be deemed knowledge of the company.

"SEC. 26. The governor shall have authority to appoint one or more state constables at a salary of two dollars per day and expenses, when on duty, to see that this act is enforced, the same to be charged to the expense account of the state commissioner."

Mr. D. A. Townsend, Attorney General of the State of South Carolina, for the petitioner.

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Argument for Petitioner.

I. The Circuit Judge had no jurisdiction of the matter involved in the proceedings for contempt.

The petitioner was attached for contempt while discharging his duty as an officer of the State, in the execution of a valid police law, and in doing so he was not violating the Constitution or laws of the United States, nor any order, process, or decree of any court or judge thereof. The Circuit Court had no jurisdiction of the matter. Rev. Stat. § 753, and cases noted; Gould & Tucker's Notes to § 753, p. 219.

II. That judge exceeded his authority in attaching the petitioner for contempt. The Dispensary Law is a valid police law. It is to be observed that the Circuit Judge bases his judgment solely upon the ground that the petitioner, as state constable, had no right to seize the liquor without a warrant, as such seizure was forbidden by the constitution of the State; and only for that reason holds that such seizure was an improper interference with the receiver. It will also be seen that he concedes that the receiver "as a common carrier is bound to respect and obey the laws of the State."

The validity of the Dispensary Law, both in its general and particular provisions, will be shown by the following considerations:

(*a*) The legislature of the State is that department of the government in which the sovereign police power of the people is exclusively lodged, and it is restrained in the exercise of such power only by the provisions of the state constitution, which expressly, or by necessary implication, limit it, and cannot be restrained by Federal law. *Western Union Tel. Co.* v. *Pendleton*, 122 U. S. 347, 359; *New Orleans Gas Light Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661; *Barbier* v. *Connolly*, 113 U. S. 27; *City of New York* v. *Miln*, 11 Pet. 102, 139.

In *Crowley* v. *Christensen*, 137 U. S. 86, 91, it is said:

"It" (sale of liquor) "is a question of public expediency and public morality, and not of Federal law. The police power of the State is fully competent to regulate the business — to mitigate its evils or to suppress it entirely. . . . The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as

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it may deem proper the power of passing upon applications for permission to carry it on and to issue licenses for that purpose. It is a matter of legislative will only. As in many other cases, the officers may not always exercise the power conferred upon them with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the State: nor is it one which can be brought under the cognizance of the courts of the United States." See also *Trageser* v. *Gray*, 73 Maryland, 250, 260; *Giozza* v. *Tiernan*, 148 U. S. 657; *The License Cases*, 5 How. 504, 631, 632; *Mugler* v. *Kansas*, 123 U. S. 623, 660; *The State* v. *Wheeler*, 25 Connecticut, 290, 297.

(*b*) The provisions of the Federal and state constitutions which limit legislative power are only intended to protect the individual citizen against any infringement upon his private rights by the public, and only apply when there is such infringement. In regard to the traffic in intoxicating liquors, no citizen has the inherent right to sell them. *Giozza* v. *Tiernan*, 148 U. S. 657; *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Mugler* v. *Kansas*, 123 U. S. 623; *Crowley* v. *Christensen*, 137 U. S. 86, 91.

(*c*) It follows, therefore, as a general conclusion from the two foregoing propositions, that the constitutional provisions, which are the bulwarks of private rights against public power, do not apply in the matter of the police regulation of the liquor traffic by the State, and the legislature is wholly unlimited in the exercise of its power, save by its discretion as to the extent and manner thereof.

(*d*) In the light of this general conclusion of law it may be assumed that the Dispensary Law is a valid police law.

III. It is not necessary to cite any authority to show that the trade in intoxicating liquors is a matter fully within the police power of the State, and that there is a necessity for the exercise of such power in regard thereto. The validity of this Dispensary Law, both in its general purpose and scope and in its particular provisions, is shown by the authority already cited. The only general objection urged against it is, that it creates a monopoly. This is not a sound objection. As has

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been shown, no citizen of this country has a right to sell intoxicating liquors, and hence the people have no common right to engage in that trade as a business. When the legislature, in the exercise of the police power, sees fit to commit the control of that trade to the State, under such regulations as its discretion suggests, it does not deprive any citizen of his rightful business and does not create a monopoly in the proper and objectionable sense of that word.

Besides, as the prohibition or regulation of such trade rests entirely within the police power of the legislature, it may make the license to sell intoxicating liquors exclusive in the State or in any corporation or citizen when deemed necessary. *The State* v. *Brennan's Liquors*, 25 Connecticut, 278.

This doctrine of monopoly by the State of the trade in intoxicating liquors is sustained in principle by the *Slaughter-House Cases*, 16 Wall. 36.

IV. It is also urged that the Fourteenth Amendment is violated by some of the provisions in the Dispensary Law. But the Dispensary Law being a police law, the Fourteenth Amendment cannot impair its provisions. Besides, there is no discrimination which makes the clause class legislation. *Barbier* v. *Connolly*, 113 U. S. 27, 32; *Trageser* v. *Gray*, 73 Maryland, 250.

V. It is further contended: (1) that the statute does not authorize a seizure without warrant, and (2), that if it be construed to give such authority, it violates the provisions of the constitution respecting unreasonable searches and seizures. This provision of the constitution of South Carolina is substantially the same as the provisions of the Constitution of the United States and of Maine, Massachusetts, and Vermont, in regard to searches and seizures. In the statutes of each of those States, as to intoxicating liquors, there is an express provision allowing the proper officer to seize the liquor intended for unlawful sale and to arrest the keeper of it "without warrant," and then to proceed formally in the matter, to its adjudication.

These provisions of statutes of Maine, Massachusetts, and Vermont as to arrest and seizure "without a warrant" have

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been construed and sustained by the highest courts in those states. *Jones* v. *Root*, 6 Gray, 435; *State* v. *O'Neil*, 58 Vermont, 140; *In re Powers*, 25 Vermont, 261; *The State* v. *McCann*, 59 Maine, 383; *The State* v. *Dunphy*, 79 Maine, 104.

VI. The position taken by respondent's counsel, that the liquors in question could not be seized by the petitioner, because it was in the custody of the law, is untenable.

It is admitted that all the property of the South Carolina Railway Company, when it passed into the hands of the receiver, went into the custody of the law, and that the receiver could not be arrested for obeying the order of the court in reference thereto; nor could his possession of the property be interfered with by seizure under execution. But the liquor in question was not in the custody of the law simply because it happened to be in the temporary possession of the receiver. It was no part of the property of the railway company that had been taken into the custody of the law, under and by virtue of the receivership thereof. The receiver had transported it as a common carrier, as the property of Lowenstein Bros., to Charleston, and there held it as their property for delivery to them as the owners. He sustained no other relation to the liquor than that which the railway company itself sustained to it, to wit, that which imposed the duty upon him to deliver it, if not prevented by the law, and allowed him to charge proper freight thereon.

So the receiver in this case being a common carrier, who had performed his duty as such in transporting the liquor, and then held it as the property of another, to be delivered upon payment of proper charges, had no higher rights in regard to the same than any other warehouseman would have.

It follows, therefore, that the liquor not being a part of the property of the railway company in the control of the court, and being the property of another, in temporary charge of the receiver or warehouseman, he could not properly hold it against the seizure by your petitioner, and the court could not protect him in refusing that obedience to a valid police law incumbent upon every citizen.

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VII. The position taken by the respondent's attorney, that Rev. Stat. § 974, quoted by him, authorizes the punishment for contempt by both imprisonment and payment of the costs, is incorrect.

That section evidently refers to regular prosecutions for crimes, and has no reference to punishment for contempts under rule.

It must be concluded either that, if the costs are a fine, they cannot be imposed as joint punishment with imprisonment; or that, if not considered a fine, they are added as a part of the punishment, and are in excess of the limitation of the statute.

In either case, the express limitation upon the power to punish must control.

Mr. Joseph W. Barnwell, opposing.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

We reiterate what has so often been said before, that the writ of *habeas corpus* cannot be used to perform the office of a writ of error or appeal; but when no writ of error or appeal will lie, if a petitioner is imprisoned under a judgment of the Circuit Court which had no jurisdiction of the person or of the subject-matter, or authority to render the judgment complained of, then relief may be accorded. *In re Frederich*, 149 U. S. 70; *In re Tyler, Petitioner*, 149 U. S. 164.

The contention here is that the order of committal was wholly void for want of jurisdiction to make any order whatever, or to make the particular order.

1. To sustain the proposition that the court had no jurisdiction to commit, it is argued that the petitioner was in the discharge of his duty as an officer of the State in the execution of a valid police law of the State, authorizing the search and seizure; that his action was therefore justifiable, and judicial interference with him absolutely precluded.

The validity of the Dispensary Act was elaborately discussed

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by counsel for petitioner, but we perceive no necessity for entering upon an examination of that question. The Circuit Court was of opinion that the act did not authorize a seizure without warrant. It was admitted below that such a seizure could not be made except under the authority of a statute conferring the power to do so, and nothing to the contrary has been adduced on this argument.

Any other view would be inconsistent with settled principles of the common law and with familiar constitutional provisions for the security of person and property and immunity from unreasonable searches and seizures. The original occasion for securing that immunity may have been the abuse of executive authority in the matter of obtaining evidence of political offences, but these safeguards are not therefore limited in their scope, and extend protection against every exertion in that direction of merely arbitrary power.

In some of the States authority to proceed in respect of liquors, without warrant in the first instance, is expressly given by statute, but is accompanied by the provision that when the seizure is so made, the property seized is to be kept in safety for a reasonable time until a warrant can be procured, and it is held that, should the officer neglect to obtain a warrant within such time, he will be liable as a trespasser. *Kent* v. *Willey*, 11 Gray, 368; *Weston* v. *Carr*, 71 Maine, 356. In *Kennedy* v. *Favor*, 14 Gray, 200, 202, Chief Justice Shaw said: "The authority to seize liquors without a warrant, though sometimes necessary, is a high power; and, being in derogation of common law right, it is to be exercised only where it is clearly authorized by the statute or rule of law which warrants it."

In his examination of the Dispensary Act the learned judge holding the Circuit Court pointed out that it was to be strictly construed and not to be extended beyond the import of its terms. *Northern Pacific Railroad* v. *Whalen*, 149 U. S. 157. The act could not be regarded as dealing with intoxicating liquors as if they were a deadly poison whose presence was noxious *per se*, which might justify an enlarged construction of the language of the statute to the end that so fearful a nui-

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sance might be abated, for their use as a beverage was recognized, and their sale placed in the hands of public officials. Moreover, it was not admissible to hold by construction that the statute had authorized the seizure of the goods without warrant, in view of section twenty-two of article I. of the constitution of South Carolina, which declared that "all persons have a right to be secure from unreasonable searches, or seizure of their persons, houses, papers, or possessions. All warrants shall be supported by oath or affirmation, and the order of the warrant to a civil officer to make search or seizure in suspected places, or to arrest one or more suspected persons, or to seize their property, shall be accompanied with a special designation of the persons or objects of search, arrest, or seizure, and no warrant shall be issued but in the cases and with the formalities prescribed by the laws."

Indeed, the statute upon any reasonable construction did not contemplate action without process. By the twenty-second section, places where intoxicating liquors were sold, bartered, or given away, or where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors were kept for sale, barter, or delivery, in violation of the act, were declared to be common nuisances, and if the existence of such nuisance were established, either in a criminal or equitable action, upon the judgment of a court or judge having jurisdiction, finding the place to be a nuisance, it was to be abated and the liquors and accessories taken possession of and confiscated.

Under section twenty-three, such places might be enjoined and abated by action in the name of the State, careful provision being made that orders for the search and seizure of the goods should only be issued upon an affidavit stating or showing that intoxicating liquors particularly described were kept for sale, or sold, bartered, or given away on the premises, particularly describing the same.

The twenty-fifth section provided that liquors in transit intended for unlawful sale in the State might be seized and proceeded against as if "unlawfully kept and deposited in any place," and were therefore not subject to seizure without pre-

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liminary proceeding or judicial action, as provided in sections twenty-two and twenty-three in regard to liquors so unlawfully kept and deposited. So far from the argument being well founded that because the provisions of the twenty-second and twenty-third sections were not expressly repeated in the twenty-fifth, it was to be inferred that they were dispensed with, the provision that liquors in transit might be seized and proceeded against as if "unlawfully kept and deposited in any place," made them a part of the section by reference, and it was in accordance with those sections that such property could be condemned; and that that involved here was turned over by petitioner to the sheriff of Charleston County. The duties of a constable were under section twenty-four to notify the circuit solicitor of the violation of any of the provisions of the act under section twenty-four, and under section twenty-two, if the existence of the nuisance therein mentioned were established either in a criminal or equitable action, he might be directed to abate the place by taking possession thereof. Certainly, seizure by him without warrant or judicial action was not expressly authorized by the statute nor by implication upon any canon of construction applicable to an act creating offences unknown to the common law and authorizing confiscation.

It is insisted that the Circuit Court was in error in the views it entertained and the conclusion reached in accordance therewith. But this objection is of error merely, and does not go to the power of the court in the premises. Judgments of courts, whether Federal or state, cannot be treated as void and attacked collaterally on *habeas corpus*, even if error has actually supervened.

It must be remembered that this property was in the custody of the officer of the court; that it had been brought into the State before the act went into operation; that it had not been delivered because of imperfect address; that there was no concealment and no occasion for haste; and that there was no difficulty in the way of application to the court, to have the goods detained or for permission to withdraw them from the receiver's possession. Nothing can be clearer than that

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the court had jurisdiction to determine whether the goods were retained in violation of the laws of the State; whether the receiver in conducting the business of the railroad in respect of the transportation of this barrel was proceeding "according to the valid laws of the State" as provided by the second section of the act of Congress of March 3, 1887, (24 Stat. 552, c. 373,) and whether the seizure was authorized by any law of the State.

The possession of property by the judicial department, whether Federal or state, cannot be arbitrarily encroached upon without violating the fundamental principle, which requires coördinate departments to refrain from interference with the independence of each other, *In re Tyler, Petitioner*, 149 U. S. 164, and the position that a petty officer can take property from the possession of a court without permission and without warrant, "upon his own motion and without instructions from any other person," as petitioner admits he did, because in his view the duty is imposed upon him by a particular statute, and that the court is without power to pass upon the questions involved, or, if it does so, that its judgment may be treated with contemptuous defiance, is utterly inadmissible in any community assuming to be governed by law.

We entertain no doubt whatever that the Circuit Court had jurisdiction, and it necessarily follows that its determination that the action of the constable was illegal, and that he was in contempt in seizing and persisting in holding the property, is not open to review in this proceeding.

2. It is further contended that the court exceeded its power in that the payment of costs was required, because the costs were in the nature of a fine, and therefore the punishment inflicted was both fine and imprisonment. Under section 970 of the Revised Statutes, when judgment is rendered against a defendant in a prosecution for any fine or forfeiture, he shall be subject to the payment of costs, and on every conviction for any other offence, not capital, the court may in its discretion award that the defendant shall pay the costs of the prosecution; and as contempt of court is a specific criminal offence, it is said that the judgment for payment of costs

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Syllabus.

would appear to be within the power of the court, although by section 725 it is provided that contempts of the authority of courts of the United States may be punished "by fine or imprisonment, at the discretion of the court." But be that as it may, the sentence here was that the petitioner be imprisoned "until he returns to the custody of the receiver, the barrel taken by him from the warehouse without warrant of law. And when that has been surrendered, that he suffer a further imprisonment thereafter in said county jail for three months and until he pay the costs of these proceedings." As the prisoner has neither restored the goods nor suffered the imprisonment for three months, even if it was not within the power of the court to require payment of costs and its judgment to that extent exceeded its authority, yet he cannot be discharged on *habeas corpus* until he has performed so much of the judgment or served out so much of the sentence as it was within the power of the court to impose. *Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 93 U. S. 18.

The application for the writ of habeas corpus is denied.

In re HOHORST, Petitioner.

ORIGINAL.

No. 7. Original. Argued November 14, 1893. — Decided December 18, 1893.

In the act of March 3, 1887, c. 373, § 1, as corrected by the act of August 13, 1888, c. 866, giving the Circuit Courts of the United States original jurisdiction, "concurrent with the courts of the several States," of all suits of a civil nature, in which the matter in dispute exceeds $2000 in amount or value, "arising under the Constitution or laws of the United States" or in which there is "a controversy between citizens of a State and foreign States, citizens or subjects," the provision that "no civil suit shall be brought against any person by any original process or proceeding in any other district than that whereof he is an inhabitant," is inapplicable to an alien or a foreign corporation sued here, and especially in a suit for the infringement of a patent right; and such a person or corporation

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Statement of the Case.

may be sued by a citizen of a State of the Union in any district in which valid service can be made upon the defendant.

It is a sufficient service of a subpœna upon a foreign steamship company, which has within the district no officer, and no agent expressly authorized to accept service, to serve it upon its financial agent, at his office, at which the financial and monetary business of the company in this country is transacted, and which has been advertised by the company as its own office; although the docks of the company, where its steamships land and take and discharge cargo, and its office for the transaction of matters connected with its actual industrial operations in this country, are in another district.

If a suit brought in the Circuit Court of the United States against a foreign corporation and against individuals is erroneously dismissed as against the corporation for want of jurisdiction thereof, mandamus lies to compel that court to take jurisdiction of the suit as against the corporation. And when an appeal, taken by the plaintiff to this court within six weeks from the order of dismissal, remains upon the docket, without any motion by the appellee to dismiss it, until the case is reached for argument, and is then dismissed by the court for want of jurisdiction, and the plaintiff, within five weeks afterward, applies for a writ of mandamus, there is no such laches as should deprive him of this remedy.

THIS was a petition for a writ of mandamus to the Judges of the Circuit Court of the United States for the Southern District of New York, to command them to take jurisdiction and proceed against the Hamburg-American Packet Company upon a bill in equity, filed in that court on September 15, 1888, by the petitioner, described in the bill as of the city of New York, and a citizen of the State of New York against "the Hamburg-American Packet Company, a corporation organized and existing under the laws of the Kingdom of Hanover, Empire of Germany, and doing business in the city of New York; Henry R. Kunhardt, Sr., Henry R. Kunhardt, Jr., George H. Diehl, citizens of the United States and residents of the State of New York, and Arend Behrens and William Koester, citizens of the United States and residents of the State of New Jersey;" for the infringement by all the defendants of letters patent granted by the United States to the plaintiff for an improvement in slings for packages. Upon that bill the following proceedings took place:

A subpœna was issued, addressed to all the defendants, and was served on September 17, 1888, as stated in the marshal's

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return thereon, "upon the within named defendant, Henry R. Kunhardt, Sr., by exhibiting to him the within original, and at the same time leaving with him a copy thereof;" and "upon the within named defendant, Hamburg-American Packet Company, by exhibiting to Henry R. Kunhardt, Sr., general agent for said company, the within original, and at the same time leaving with him a copy thereof."

On November 5, 1888, the return day of the subpœna, a general appearance for all the defendants was entered by a solicitor.

On December 18, 1888, the company, "by Kunhardt & Co., agents," filed a demurrer to the bill, for multifariousness, for want of equity, "and for divers other good causes of demurrer appearing in the said bill of complaint" and not otherwise specified; and supported the demurrer by the affidavit of Behrens, that he was an agent of the company, that the demurrer was not interposed for delay, and that he was duly authorized to make the affidavit in behalf of the company.

On December 24, 1888, the plaintiff moved for leave to amend his bill, by alleging that the defendants jointly infringed his patent; and "that all of the defendants above named are inhabitants of the city and county of New York; that the defendant, the Hamburg-American Packet Company, has its principal business office in this country located in the city and county of New York; that the defendants Henry R. Kunhardt, Sr., Henry R. Kunhardt, Jr., George H. Diehl, Arend Behrens and William Koester are, and during the time of the infringement above set forth were, copartners under the firm name of Kunhardt & Company, and as such copartners are and were the agents and managers of the business of the Hamburg-American Packet Company in this country, and have their principal business office as such located in the city and county of New York; and that the said infringements were committed in the prosecution of such business, and all the defendants have coöperated and participated in all the said acts and infringements."

An affidavit of Behrens, filed in opposition to this motion, contained the following statements: "I do not regard it as

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true that the Hamburg-American Packet Company has its principal business office in this country located in the city and county of New York. The actual facts are that the said company has its docks, where all its steamers land and take and discharge cargo, situated in the State of New Jersey. There also is the office of the company for the transaction of the matters immediately connected with all its actual industrial operations in this country. Said company advertises that it has an office in the city of New York, which is the office of the firm of Kunhardt & Co., is rented by Kunhardt & Co., and entirely under their control. It is in fact the office of Kunhardt & Co., agents for the Hamburg-American Packet Company; and in said office of Kunhardt & Co., and by Kunhardt & Co. as agents, the usual monetary and financial transactions of said Hamburg-American Packet Company are conducted. All the actual physical business of said Hamburg-American Packet Company within the United States, however, is conducted within the State of New Jersey, as aforesaid. It is not true that Kunhardt & Co. have, jointly with said Hamburg-American Packet Company, infringed the letters patent set forth in the bill of complaint. All operations of loading and unloading the cargo from the said Hamburg-American Packet Company's vessels in this country are performed in New Jersey as aforesaid, under the immediate direction and control of a superintendent especially employed and appointed by the Hamburg-American Packet Company for that purpose and whose salary or compensation is paid by said company, and with the direction and details of whose supervision of said loading and unloading the firm of Kunhardt & Co. have no concern and exercise no control."

On January 7, 1889, the company moved to dismiss the bill for want of jurisdiction.

On January 11, 1889, the motion to amend and the motion to dismiss were heard together; and the court denied the motion to dismiss, "but without prejudice to any subsequent demurrer, plea, answer or motion to dismiss, because of lack of jurisdiction;" gave the plaintiff leave to amend the bill, as prayed for, *nunc pro tunc* as of the time when it was filed;

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and gave the defendants leave to answer, plead or demur to the bill, as amended, on or before the first Monday of March. On February 2, 1889, the plaintiff filed a bill so amended.

On February 16, 1889, the company served on the plaintiff notice of hearing upon the bill and demurrer.

On February 21, 1889, the company moved for leave to amend its general appearance into a special appearance for the specific and only purpose of moving to set aside the service of the subpœna upon it through its alleged agent Henry R. Kunhardt, Sr., and to dismiss the bill as against it for want of jurisdiction; and also moved to set aside the service and to dismiss the bill as against it, "because of lack of jurisdiction of this court over the person of said defendant."

An affidavit of Richard John Cortis, filed in support of this motion, stated that for several years he had been well acquainted with the details of the organization and residence and general business of the company; that its principal offices and place of business were and always had been at the city of Hamburg in the Empire of Germany, and the residences of all its directors and stockholders were within the territorial limits of that empire; and that it had never had an office in the city of New York, or at any place within the Southern District of New York.

On April 5, 1889, the court ordered that this motion be granted, unless the plaintiff should, within five days, file a stipulation to withdraw the amended bill as to the company, and to go to trial as to the company upon the original bill. 38 Fed. Rep. 273. No such stipulation having been filed, on April 11, 1889, the court ordered that the appearance be amended as moved for; that the service of the subpœna upon the company be set aside and quashed; and that the bill be dismissed as against the company.

From that order the plaintiff, on May 23, 1889, took an appeal, which was entered in this court on October 8, 1889, argued on March 13, 1893, and dismissed on March 27, 1893, for want of jurisdiction, because that order, not disposing of the case as to all the defendants, was not a final decree, from which an appeal would lie. 148 U. S. 262.

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Opinion of the Court.

On May 1, 1893, an application was made to this court for leave to file the present petition, praying for a writ of mandamus to the Judges of the Circuit Court to take jurisdiction and proceed against the company in the suit aforesaid, and to strike from the record the order of April 11, 1889, and to make such disposition of the suit as ought to have been made had that order not been made; and for such other relief in the premises as might be just.

On May 10, 1893, this court gave leave to file the petition, and granted a rule to show cause, returnable at this term. On October 17 a return was filed, setting forth the foregoing proceedings of the Circuit Court, and stating that the order of April 11, 1889, was made upon the following grounds:

1st. That it was made to appear, and the Circuit Court found, that the company had originally made a general, instead of a special, appearance in the suit, because of a justifiable mistake on its part as to the nature of the suit, caused by the plaintiff's own allegations in the original bill.

2d. That it appeared by the affidavits and other proceedings set forth in the record that the company is a corporation organized and existing under the laws of the Kingdom of Hanover, Empire of Germany, and is not, and was not at the time of the service of the subpœna upon Henry R. Kunhardt, Sr., an inhabitant of the Southern District of New York.

3d. That, upon the facts as presented to the Circuit Court, and shown by the record, it did not appear that said Kunhardt was at any time the general agent of the company, or such an agent that service upon him of the subpœna in the suit was sufficient to confer jurisdiction over the company.

Mr. Charles M. Demond for petitioner.

Mr. Walter D. Edmonds opposing.

Mr. Justice Gray, after stating the case, delivered the opinion of the court.

By the Constitution of the United States, art. 3, sect. 2, the judicial power shall extend to all cases, in law and equity,

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arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to controversies to which the United States shall be a party; to controversies between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between citizens of a State and foreign States, citizens or subjects.

By the act of March 3, 1887, c. 373, § 1, as corrected by the act of August 13, 1888, c. 866, "the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States," "or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens or subjects." 24 Stat. 552; 25 Stat. 434.

The intention of Congress is manifest, at least as to cases of which the courts of the several States have concurrent jurisdiction, and which involve a certain amount or value, to vest in the Circuit Courts of the United States full and effectual jurisdiction, as contemplated by the Constitution, over each of the classes of controversies above mentioned; and (what particularly concerns the case at bar) Congress, following the very words of the Constitution, has here vested in those courts jurisdiction of controversies "between citizens of a State and foreign States, citizens or subjects."

The question then arises how far the jurisdiction thus conferred over this last class of controversies, and especially over a suit by a citizen of a State against a foreign citizen or subject, is affected by the subsequent provisions of the same section, by which, after other regulations of the jurisdiction of the Circuit Courts and District Courts of the United States,

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it is enacted that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but, where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Of these two provisions, the latter relates only to suits between citizens of different States of the Union, and is therefore manifestly inapplicable to a suit brought by a citizen of one of these States against an alien. And the former of the two provisions cannot reasonably be construed to apply to such a suit.

The words of that provision, as it now stands upon the statute book, are that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant." These words evidently look to those persons, and those persons only, who are inhabitants of some district within the United States. Their object is to distribute among the particular districts the general jurisdiction fully and clearly granted in the earlier part of the same section; and not to wholly annul or defeat that jurisdiction over any case comprehended in the grant. To construe the provision as applicable to all suits between a citizen and an alien would leave the courts of the United States open to aliens against citizens, and close them to citizens against aliens. Such a construction is not required by the language of the provision, and would be inconsistent with the general intent of the section as a whole.

This view is confirmed by a consideration of the earlier statutes upon this subject, which, although repealed, may properly be referred to in aid of the construction of existing laws. *Ex parte Crow Dog*, 109 U. S. 556, 561; *Viterbo* v. *Friedlander*, 120 U. S. 707, 725, 726. The corresponding provision, as originally enacted in the Judiciary Act of September 24, 1789, c. 20, § 11, continued in force for the greater part of a century, and retained in the Revised Statutes,

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applied only to inhabitants of the United States; for its words were that no civil suit should be brought "against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." 1 Stat. 79; Rev. Stat. § 739. The substitution, in the act of March 3, 1875, c. 137, § 1, of the words "against any person" for the words "against an inhabitant of the United States," has been assumed to be an immaterial change. 18 Stat. 470; *In re Louisville Underwriters*, 134 U. S. 488, 492; *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 448. But if the act of 1875 could have been treated as extending the provision to suits against aliens, it could only be by virtue of the clause permitting defendants to be sued in the district in which they were found. That clause having been stricken out in the acts of 1887 and 1888, the provision, as it stands in these acts, must be limited by implication, as the provision in its original form was by express words, to inhabitants of the United States; and it is therefore inapplicable to an alien or to a foreign corporation.

Moreover, the present suit is for an infringement of a patent for an invention, the jurisdiction of the national courts over which depends upon the subject-matter, and not upon the parties; and, by statutes in force at the time of the passage of the acts of 1887 and 1888, the courts of the nation had original jurisdiction "exclusive of the courts of the several States," "of all cases arising under the patent-right or copyright laws of the United States," without regard to the amount or value in dispute. Rev. Stat. § 629, cl. 9; § 711, cl. 5. The section now in question, at the outset, speaks only of so much of the civil jurisdiction of the Circuit Courts of the United States, as is "concurrent with the courts of the several States," and as concerns cases in which the matter in dispute exceeds two thousand dollars in amount or value. The grant to the Circuit Courts of the United States, in this section, of jurisdiction over a class of cases described generally as "arising under the Constitution and laws of the United States," does not affect the jurisdiction granted by earlier statutes to any court of the United States over specified cases of that class. If the

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clause of this section defining the district in which suit shall be brought is applicable to patent cases, the clause limiting the jurisdiction to matters of a certain amount or value must be held to be equally applicable, with the result that no court of the country, national or state, would have jurisdiction of patent suits involving a less amount or value. It is impossible to adopt a construction which necessarily leads to such a result. *United States* v. *Mooney*, 116 U. S. 104, 107; *Miller-Magee Co.* v. *Carpenter*, 34 Fed. Rep. 433.

It was contended in behalf of the company that this case was governed by the recent decisions of this court in *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, and *Southern Pacific Co.* v. *Denton*, 146 U. S. 202. But those decisions went no further than to hold that within the meaning of the Judiciary Acts a corporation cannot be considered a citizen, an inhabitant or a resident of a State in which it has not been incorporated; and that under the act of 1888 a corporation, incorporated in one of the United States and in that State only, cannot be compelled to answer in another State in which it has a usual place of business, and of which the plaintiff is not a citizen. In the first of those cases it was observed that the question what might be the rule in suits against an alien or a foreign corporation was not before the court, and might be governed by different considerations. 145 U. S. 453.

Upon deliberate advisement, and for the reasons above stated, we are of opinion that the provision of the existing statute, which prohibits suit to be brought against any person "in any other district than that whereof he is an inhabitant," is inapplicable to an alien or a foreign corporation sued here, and especially in a suit for the infringement of a patent right; and that, consequently, such a person or corporation may be sued by a citizen of a State of the Union in any district in which valid service can be made upon the defendant. *In re Louisville Underwriters*, 134 U. S. 488.

The question, then, whether the Hamburg-American Packet Company was bound to answer to the suit brought by this petitioner against it, depended upon the question whether Henry R. Kunhardt, Sr., upon whom the subpœna was served,

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was such an agent of the company that service upon him as its agent was sufficient service upon the company.

The marshal's return upon the subpœna states that the service thereof upon the company was made by serving it upon said Kunhardt, "general agent for said company." This return, of course, is not conclusive of that fact. But upon the affidavits filed by the company, giving them the utmost effect in its favor, the real state of facts was as follows: There is no room for suggesting that there was within the district any director or other officer of the company, or any agent expressly authorized to accept service upon it. The company's docks where its steamships land and take and discharge cargo, and its office for the transaction of matters immediately connected with its actual industrial operations in this country, were in the State of New Jersey, and under the charge of a superintendent employed and paid by the corporation for the purpose, and not a member of the firm of Kunhardt & Co. But the usual monetary and financial transactions of the corporation were transacted by that firm, as agents of the corporation, at the office of the firm in the city of New York, which had been advertised by the corporation as its own office.

The firm of Kunhardt & Co. being the financial agents of the corporation, the office of the firm being in the city of New York, and being the office of the corporation for the transaction of its monetary and financial business in this country, the service of the subpœna in New York upon the head of the firm as general agent of the corporation was a sufficient service upon the corporation. *St. Clair* v. *Cox*, 106 U. S. 350, 359; *Société Foncière* v. *Milliken*, 135 U. S. 304; *Mexican Central Railway* v. *Pinkney*, 149 U. S. 194; New York Code of Civil Procedure, § 432; *Tuchband* v. *Chicago & Alton Railroad*, 115 N. Y. 437.

The Hamburg-American Packet Company being liable to this suit in the Circuit Court of the United States for the Southern District of New York if duly served with process in the district, and having been so served, and the order of that court dismissing the suit as against the corporation not being

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reviewable on appeal at this stage of the case, there can be no doubt that mandamus lies to compel the Circuit Court to take jurisdiction of the suit as against the corporation. *Railroad Co.* v. *Wiswall*, 23 Wall. 507; *Ex parte Schollenberger*, 96 U. S. 369; *In re Pennsylvania Co.*, 137 U. S. 451, 452.

The order of the Circuit Court dismissing the bill as against the corporation was made on April 11, 1889. Six weeks afterwards, the plaintiff appealed from that order; and his appeal was entered in this court on the first day of October term, 1889. The appellee might, at that or any subsequent term, under Rule 6, have made and submitted on briefs a motion to dismiss that appeal; but never did so before the case was called for argument in the regular order of the docket on March 13, 1893. The delay in disposing of that appeal, therefore, was less owing to the plaintiff than to the defendant. The appeal was dismissed for want of jurisdiction on March 27, 1893; and within five weeks afterwards the plaintiff presented his application for leave to file this petition for a writ of mandamus, and obtained a rule to show cause, returnable at the present term. There is no ground, therefore, for imputing to him such laches as should deprive him of this remedy.

These reasons being conclusive in favor of issuing a writ of mandamus to the Circuit Court to set aside the order of dismissal, and to take jurisdiction of the bill as against the defendant corporation, even if the appearance in its behalf in that court had been only a special appearance for the purpose of moving to dismiss the bill for want of jurisdiction, it is unnecessary to consider whether, under the circumstances of the case, the corporation was rightly allowed to amend its general appearance into a special appearance, or whether the action of the Circuit Court in that respect could be controlled by writ of mandamus.

Writ of mandamus to issue.

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Syllabus.

LEHIGH ZINC AND IRON COMPANY *v.* BAMFORD.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 8. Argued October 20, 1893. — Decided December 18, 1893.

The owners of a mine leased it to parties who agreed to pay certain royalties upon its products. The lease contained a further provision that "in case the royalty due and payable to the parties of the first part according to the above rates shall in any year fall below the sum of one thousand dollars, then the party of the second part shall pay to the parties of the first part such additional sum of money as shall make the royalty for such year amount to the sum of one thousand dollars, which sum shall be held and taken to be the royalty for that year: *Provided always*, that if sufficient ores cannot be found to yield said minimum payment, and said party of the second part shall in consequence thereof fail to pay said minimum sum of one thousand dollars yearly, then said party of the second part shall, if required by said parties of the first part, relinquish this lease and the privileges hereby granted, and the same shall cease thereupon." *Held*, that the lessees engaged to pay, as rent, in each year, the royalties fixed in the lease; and if, in any year, the royalties fell below the sum of one thousand dollars, they were to make up the deficit, so that the latter sum should, in any event, be paid annually as rent.

A person who makes representations of material facts, assuming or intending to convey the impression that he has actual knowledge of the existence of such facts, when he is conscious that he has no such knowledge, is as much responsible for the injurious consequences of such representations to one who believes and acts upon them, as if he had actual knowledge of their falsity.

Deceit may be predicated of a vendor or lessor who makes material, untrue representations in respect to his own business or property, for the purpose of their being acted upon, and which are in fact relied upon by the purchaser or lessee, the truth of which representations the vendor or lessor is bound, and must be presumed, to know.

General assertions by a vendor or lessor, that the property offered for sale or to be leased is valuable or very valuable, although such assertions turn out to be untrue, are not misrepresentations, amounting to deceit, nor are they to be regarded as statements of existing facts, upon which an action for deceit may be based, but rather as the expressions of opinions or beliefs.

Fraud upon the part of a vendor or lessor, by means of representations of existing material facts, is not established unless it appears that such

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Statement of the Case.

representations were made for the purpose of influencing the purchaser or lessee, and with knowledge that they were untrue; but where the representations are material and are made by the vendor or lessor for the purpose of their being acted upon, and they relate to matters which he is bound to know, or is presumed to know, his actual knowledge of their being untrue is not essential.

THIS action was brought to recover certain rents alleged to be due under a written lease of May 2, 1883, between Charles and Edwin Bamford, of England, and the Lehigh Zinc and Iron Company, Limited, of Pennsylvania. The company acquired by the terms of the agreement the exclusive right for ten years to mine, dig, raise, crush, concentrate, roast, use and remove, sell and dispose of, all metals and minerals found or to be found upon the leased premises.

The lease contained, among other provisions, the following:

"Second. That the party of the second part, for and in consideration of the rights and privileges thus granted, hereto covenant and agree to pay to the said parties of the first part the following rents, profits and tonnage due, to wit: Upon all concentrated ores removed from or used upon the premises, the same having been obtained by crushing, sizing, washing, jigging, or separating ores mined upon said premises, a royalty of one dollar and fifty cents per ton of two thousand pounds (2000 lbs.); upon all concentrated ores which may be obtained by crushing, sizing, washing, jigging, or separating ores or minerals hauled and brought to the said premises from other estates and mines, a royalty for the use of the soil, buildings, machinery, and fixtures hereby leased shall be paid to the parties of the first part as follows, viz.: During two days of each week a royalty of fifty cents per ton of two thousand pounds of such ore so concentrated when removed from or used upon the premises aforesaid, and during the remaining five days of each week a royalty of one dollar for each ton of two thousand pounds so concentrated when removed from the premises.

"Third. Upon all ores mined upon and removed from the premises other than those above mentioned a royalty of one dollar and fifty cents a ton shall be paid to the parties of the first part; and it is also covenanted and agreed that the said

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party of the second part shall put all the engines, boilers, and machinery which it shall use in good and substantial repair, and keep and leave them in the same good order, ordinary wear and tear excepted."

"Fifth. That the party of the second part shall pay or cause to be paid to the parties of the first part or their duly authorized agent or attorney at New York city on the twentieth days of January, April, July, and October of each year all sums of money found to be due by said party of the second part for ores removed during the three full calendar months next preceding, and shall accompany each remittance with a detailed statement of weights and amounts so accruing, specifying also whence such ores were originally obtained.

"Sixth. In case the royalty due and payable to the parties of the first part according to the above rates shall in any year fall below the sum of one thousand dollars, then the party of the second part shall pay to the parties of the first part such additional sum of money as shall make the royalty for such year amount to the sum of one thousand dollars, which sum shall be held and taken to be the royalty of that year: *Provided always*, That if sufficient ores cannot be found to yield said minimum payment, and said party of the second part shall in consequence thereof fail to pay said minimum sum of one thousand dollars yearly, then said party of the second part shall, if required by said parties of the first part, relinquish this lease and the privileges hereby granted, and the same shall cease thereupon."

The company acquired by the agreement the exclusive right to purchase the leased estate, mining rights, etc., at the price of $125,000, payable according to certain named terms.

The complaint alleged that the company entered upon the leased premises and dug and carried away ores, but only in such quantities that at the agreed rates the royalties fell below $1000 in each of the years ending May 2, 1884, and May 2, 1885. Judgment was asked for $1000 for each of those years less the sum of $59.49, leaving a balance of $1940.51, with interest from May 2, 1884, on $940.51, and from May 2, 1885, on $1000.

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Statement of the Case.

The company denied all indebtedness to the plaintiffs, and asserted a counter claim for the sum of $8000. The answer alleged that Charles Bamford, for himself and Edwin Bamford, in order to induce the company to lease the property, represented the mine to be a valuable ore-producing one; that, properly worked, it would yield, and had yielded, a large amount of zinc and other metals; that it was still a valuable mine for such purposes, and would be a source of profitable investment to the company; that when those statements and representations were made the mine was flooded to the extent of nearly one hundred feet, so that it was impossible for the company's officers, agents, and servants to make actual examination of it; that, relying upon and believing such statements and representations to be true, the defendant entered into the contract; that immediately after the execution of the lease the company, in consequence of the above representations and statements, purchased from the Bamfords a large quantity of tools, wagons, material, and personal property, to be used in developing the mine, paying therefor the sum of $883.74; and that the articles so purchased were of no use or value except for the purpose for which they were so purchased. The answer further alleged that in developing the mine the company expended, in addition to moneys for materials and for cleaning the mine, nearly $4000, the aggregate of all expenditures by it in that way being between $5500 and $6000; that its officers devoted their personal attention and labor to the business, the value of such services being at least $2500; that these expenditures were made in good faith and in reliance upon Bamford's statements as to the character of the mine; and that these representations, so made to induce, and which did induce, the company to enter into the lease, were entirely false, whereby it had sustained a loss of at least $8000.

By stipulation between the parties the plaintiffs had leave to amend and did amend the complaint, claiming judgment for the sum of $1000, with interest from May 1, 1886, for an additional instalment of minimum rent due May 1, 1886.

At the trial the plaintiffs read in evidence the written contract of lease and rested their case. The company then moved

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Argument for Plaintiff in Error.

to dismiss the complaint upon grounds set forth in writing. The court denied the motion, and to that ruling the defendants excepted.

The company introduced evidence tending to show that Charles Bamford, prior to the execution of the lease, made the representations stated in the answer and counter claim. The bill of exceptions states that the defendants in the latter part of 1883 ceased to work the mine and never resumed, and subsequently claimed that it was valueless for producing ores. The plaintiffs introduced evidence tending to show that the statements alleged to be made by Charles Bamford were in fact true; that the mine properly worked would be a valuable ore-producing one; that the plaintiffs made no statements about it; and that the company was acquainted with its character and relied upon their own knowledge, and not upon any statements by the plaintiffs. It appeared in evidence that the company entered into possession and used for several months the mines, buildings, machinery, and fixtures described in the schedule of the lease, which buildings and fixtures cost upwards of $60,000. It did not appear that any complaint of misrepresentation, failure, mistake, or disappointment was made until the answer was filed in this action about August, 1885.

There was a verdict in favor of the plaintiffs for $3201.58, for which sum judgment was rendered.

Mr. Sidney Ward for plaintiff in error.

I. It was error in the court to refuse defendant's motion to dismiss the complaint upon the close of the plaintiffs' case. The lease in question was a lease for ten years of a mine, situated at East Hempfield, in the county of Lancaster, in the State of Pennsylvania, under which the Lehigh Zinc and Iron Company, Limited, agreed to pay a royalty of $1.50 per ton. At the close of the plaintiffs' case, in the court below, the plaintiffs had failed to prove that any ore had been taken from the mine, with the exception of ores, the royalty on which amounted to $59.49, which fact appears from the allegation in the complaint, that the defendant had paid to the plaintiffs

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the sum of $59.49 on account of royalties for ore taken out. The plaintiffs had elected, in making the lease in question, to provide that if the royalty did not amount to $1000 a year the plaintiffs should have the right to determine the lease. Now, it is submitted that it is clear from this provision that the true intent of this contract was, that if the ores mined were sufficient to produce a royalty of one thousand dollars a year, the mine should be worked and carried on by the defendant; otherwise, that the plaintiffs might at their option rescind the lease and the same be determined. The sixth clause reads as follows: "In case the royalty due and payable to the parties of the first part, according to the above rates, shall in any year fall below the sum of one thousand dollars, then the party of the second part shall pay to the parties of the first part such additional sum of money as shall make the royalty for such year amount to the sum of one thousand dollars, which sum shall be held and taken to be the royalty of that year: *Provided always*, That if sufficient ores cannot be found to yield said minimum payment, and said party of the second part shall in consequence thereof fail to pay said minimum sum of one thousand dollars yearly, then said party of the second part shall, if required by said parties of the first part, relinquish this lease and the privileges hereby granted, and the same shall cease thereupon."

This proviso after the italics, it is submitted, shows clearly what was the intention of both the parties to the contract, and that such intention was, that unless the ores which could be taken out should be of a sufficient amount to make a royalty of one thousand dollars, then the liability of the defendants under the same should cease. No other construction of this proviso will give it any force, for if it was not intended to have this construction, there would have been no occasion for its insertion at the end of the preceding sentence. That this was the actual intent of the party there is no question, and it is contended that this intention is fairly deducible from the fact of the insertion of this proviso at this point.

The position taken by defendant's counsel on the trial, that no action could be maintained by the plaintiffs in the court

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below, for the one thousand dollars per year until the end of the term, is well taken, for the reason that, while it might not within one year have mined sufficient ore to produce a royalty of a thousand dollars, still the defendant was entitled, if the plaintiffs did not exercise their right to rescind the lease, to have the full term of ten years in which to mine the property and ascertain, if possible, whether the amount required to produce the minimum of royalty might not be obtained. In any event the plaintiffs could not recover on the entire contract more than the difference between the whole amount of the royalties during the entire term, and the sum of $10,000, even if they could recover this sum by reason of the failure of defendants to work the mine. This action was prematurely brought.

II. The defendant requested the court to charge that if as an inducement to defendant to enter into the lease Charles Bamford represented the mine to be well supplied with ore, and the defendant on the faith of such representation entered into said lease, and in fact there was not sufficient ore in said mine to be taken out in paying quantities, the plaintiffs could not recover and the defendant was entitled to recover its expenditures under this lease. It is submitted that the refusal of the court to charge as requested in this request is error, because the defendant, as has been suggested before, entered into this lease upon the statements and representations of Mr. Charles Bamford as to the condition of the mine. If, in point of fact, these statements were untrue, whether the statement was made wilfully or through ignorance, then the defendant, having gone on in reliance upon the statements of Charles Bamford, and having expended large sums of money and finding the mine to be worthless, was entitled to recover the expenditures which it had incurred in endeavoring to develop this mine.

Mr. L. A. Fuller, (with whom was *Mr. M. L. Towns* on the brief,) for defendants in error.

Mr. Justice Harlan, after stating the case, delivered the opinion of the court.

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The defendants requested the court to charge the jury that the plaintiffs could not recover rent for any particular year, unless it appeared that the ores mined on the leased property in that year, were sufficient, on the basis of the royalties stipulated, to amount to one thousand dollars; and that unless enough ore was found to enable the company, giving proper care and attention, to prosecute the mining without loss, then the consideration, upon which its agreement was based, failed, and plaintiffs could not recover. These propositions, embodied in specific requests for instructions to the jury, were rejected by the court. The same propositions constituted the grounds upon which the company, at the close of the plaintiffs' evidence, asked the court to dismiss the complaint. That motion and the specific requests for instructions were denied. The action of the court in those respects is assigned for error.

In our opinion no error was committed by the court below. Looking at all the provisions of the lease, it is clear that the defendant engaged to pay, as rent, in each year, the royalties fixed in the lease; and if, in any year, the royalties fell below the sum of one thousand dollars, it was to make up the deficit, so that the latter sum should, in any event, be paid annually as rent. The defendant took the chance of a failure to find ore in sufficient quantities to justify working the mines, and the plaintiffs took the chance of not obtaining more than one thousand dollars, annually, during the existence of the lease, for the use of buildings and fixtures that had cost them more than sixty thousand dollars. To secure the payment, annually, of at least one thousand dollars, the right was reserved to the plaintiffs to terminate the lease, if the company failed, in any year, to pay that sum as rent. And that the company might get the advantage of any developments indicating that the leased premises were of substantial value, the exclusive privilege was reserved to it of purchasing them at any time while the lease remained in force for the price of one hundred and twenty-five thousand dollars. The rulings of the Circuit Court were in harmony with these views.

We are also of opinion that no error was committed in refusing the defendant's request for instructions upon the subject

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of the alleged false representations. The charge, upon that issue, was very full and satisfactory. The court said, in substance, that a person who makes representations of material facts, assuming or intending to convey the impression that he has actual knowledge of the existence of such facts, when he is conscious that he has no such knowledge, is as much responsible for the injurious consequences of such representations, to one who believes and acts upon them, as if he had actual knowledge of their falsity; that deceit may also be predicated of a vendor or lessor who makes material, untrue representations in respect to his own business or property, for the purpose of their being acted upon, and which are in fact relied upon by the purchaser or lessee, the truth of which representations the vendor or lessor is bound, and must be presumed, to know. Touching the alleged representations as to the value of the leased property, the court said that general assertions by a vendor or lessor, that the property offered for sale or to be leased is valuable or very valuable, although such assertions turn out to be untrue, are not misrepresentations, amounting to deceit, nor are they to be regarded as statements of existing facts, upon which an action for deceit may be based, but rather as the expressions of opinions or beliefs; that, as a general rule, fraud upon the part of a vendor or lessor, by means of representations of existing material facts, is not established, unless it appears such representations were made for the purpose of influencing the purchaser or lessee, and with knowledge that they were untrue; but where the representations are material and are made by the vendor or lessor for the purpose of their being acted upon, and they relate to matters which he is bound to know, or is presumed to know, his actual knowledge of them being untrue is not essential.

We perceive no objections to these instructions. They were sufficient for the guidance of the jury in respect to the alleged false representations by the plaintiffs.

Judgment affirmed.

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Syllabus.

BELDEN *v.* CHASE.

ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

No. 66. Argued November 3, 1893. — Decided December 18, 1893.

This court has jurisdiction to review the judgment of the highest court of a state in an action at common law to recover damages caused by the collision of two steamers navigating inland waters over which the United States have admiralty jurisdiction, when that judgment denies rights claimed by the plaintiff in error under rules established by statutes of the United States for preventing collisions, or rights regarding the application of such rules.

The appellate jurisdiction of this court over questions national and international in their nature, arising in an action for a maritime tort committed upon navigable waters and within admiralty jurisdiction, cannot be restrained by the mere fact that the party plaintiff has elected to pursue his common law remedy in a state court.

In an action at common law for a maritime tort, the admiralty rule of an equal division of damages in the case of a collision between two vessels, when both are guilty of faults contributing to it, does not prevail; but the general rule there is that if both vessels are culpable in respect of faults operating directly and immediately to produce the collision, neither can recover damages for injuries so caused.

A steam pleasure-yacht is an "ocean-going steamer," and is not a "coasting vessel."

A steam pleasure-yacht, on the inland waters of the United States, is bound, when under way, to carry at the foremast head a bright white light, on the starboard side a green light, and on the port side a red light, as prescribed by rule 3 in Rev. Stat. § 4233; and is not required to carry "in addition thereto a central range of two white lights," as prescribed by rule 7 of that section for "coasting steam-vessels . . . navigating the bays, lakes, rivers or other inland waters of the United States," that rule not being applicable to a steam pleasure-yacht.

Regulations established by a board of supervising inspectors, under Rev. Stat. § 4412, "to be observed by all steam-vessels in passing each other," have the force of statutory enactment; are obligatory from the time when the necessity for precaution begins; and continue so while the means and opportunity to avoid the danger remains.

Where a vessel, meeting or passing another vessel, departs from the rules laid down by the supervising inspectors and a collision results, the burden of proof is on it to show that the departure was made necessary by immediate, impending, and alarming danger.

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Statement of the Case.

Where a vessel has committed a positive breach of statute, she must not only show that her fault did not probably contribute to a disaster which followed, but that it could not have done so.

Two steamers on the Hudson River at night were approaching each other head and head. One gave a short blast from its whistle to indicate an intention to pass on the port side. The other answered by a similar blast, and then gave two whistles and changed its course so as to cross the bow of the first vessel. This resulted in a collision, whereby the second vessel was sunk. An action at law was brought in a state court by the owners of the sunken vessel against the owners of the first vessel. On the trial the court was asked to instruct the jury that the pilot who first blew the sharp whistle had the right to determine the course which each was to adopt; that the answer by a single whistle was an acceptance of his determination; that it then became the duty of the second vessel to pass the other according to that determination; and that the second vessel was guilty of negligence in giving the two whistles and in changing its course. The court refused these instructions, and instructed the jury, in substance, that they were to determine whether those in management of the vessels were guilty of negligence or not, and whether they did or omitted to do that which persons of ordinary care and prudence ought to have done. *Held*,

(1) That in refusing to give the instructions asked for and in charging in this general way, the obligatory force of the rules of navigation was substantially ignored;

(2) That the instruction did not put to the jury the question whether the second vessel was justified in departing from the rules, which was error;

(3) That the jury should have been told that two vessels approaching head to head and exchanging the signal of a single whistle, were bound to pursue the course prescribed by the rules;

(4) And that they should have been further instructed that if the first vessel assented to the signal of the two whistles, and there was an error in the course, it was at the risk of the second vessel, or, at the most, both were in fault and there could be no recovery.

THIS was an action at law brought by William Donahue, owner of the steamboat Charlotte Vanderbilt, in the Supreme Court of the State of New York, against William Belden, owner of the yacht Yosemite, for so negligently navigating the yacht as to run down and sink the steamboat in the Hudson River a little north of Esopus Meadow light-house, and some ninety miles north of New York City, at or about half-past nine on the evening of July 14, 1882. Donahue died leaving a will, which was admitted to probate, and letters

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testamentary duly issued thereon to Emory A. Chase and William J. Hughes, who qualified as executors, and the action was thereupon revived and continued in their names. There have been three trials. Upon the first, a verdict was rendered in favor of the plaintiffs and judgment entered thereon, which on appeal to the general term of the Supreme Court was reversed and a new trial granted. *Chase* v. *Belden*, 34 Hun, 571. The case having been again tried, the trial court, proceeding in accordance with the rulings of the general term, nonsuited the plaintiffs. This judgment was affirmed by the general term, and upon appeal to the Court of Appeals the judgment was reversed and the cause remanded. *Chase* v. *Belden*, 104 N. Y. 86. The case was then tried a third time and a verdict rendered in favor of the plaintiffs, and judgment entered thereon for $27,668.28 damages, (the value of the Vanderbilt, with interest,) and costs, which was affirmed at the general term. *Chase* v. *Belden*, 16 N. Y. St. Rep. 528. An appeal was thereupon taken to the Court of Appeals and the judgment affirmed, the record being: "Judgment affirmed with costs. No opinion. All concur except Gray, J., who reads for reversal, and judgment affirmed." 117 N. Y. 637. The record here also shows this memorandum: "No prevailing opinion written. See mandate at close of this opinion." The dissenting opinion by Gray, J., is given in the record and is reported in 27 N. Y. St. Rep. 688. To review the judgment of the Court of Appeals this writ of error was brought.

The map on the opposite page shows the part of the river where the collision occurred.

The Yosemite was going up and the Vanderbilt down stream. While the latter was passing between the upper ice-house at Big Rock Point and the lower ice-house at Knickerbocker wharf, she was headed for a point between Esopus light and the shore, and the Yosemite at the same time was headed for a point west of Rhinebeck Bluff. When opposite the lower ice-house the Vanderbilt changed her course to the eastward and headed for Dinsmore's house. About the same time the Yosemite gave the signal of one whistle to the Vanderbilt, and she answered with one whistle.

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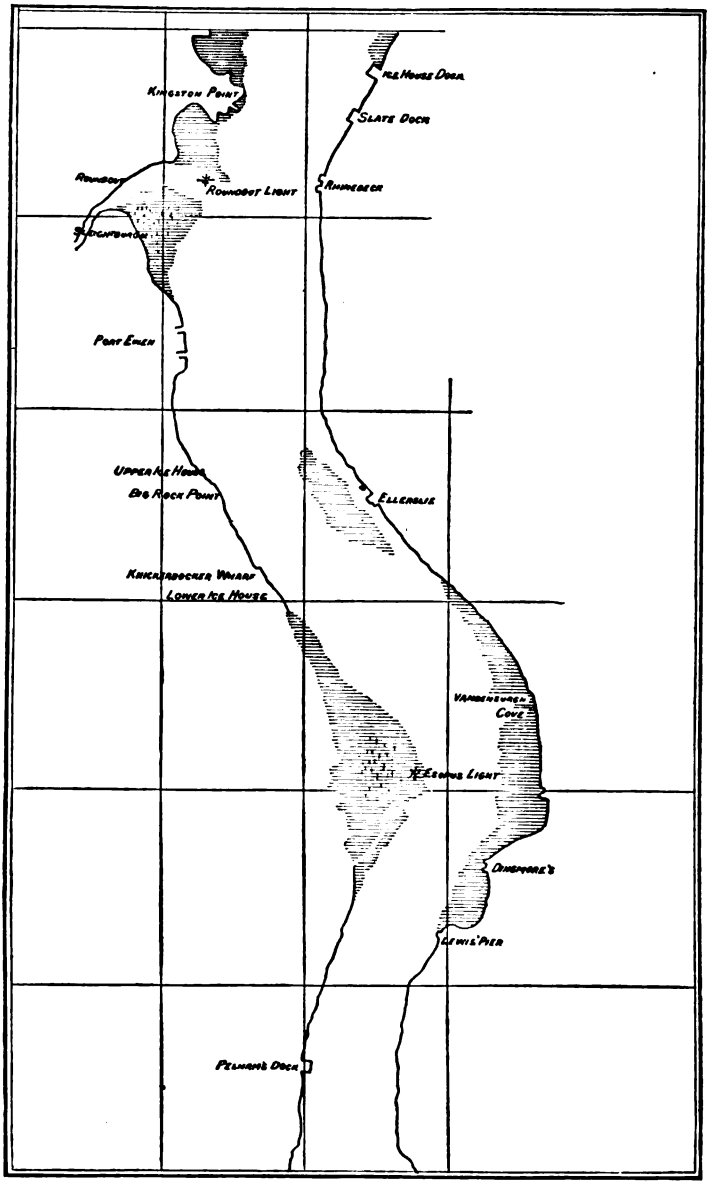
Statement of the Case.



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After the signals had been thus exchanged, the Vanderbilt blew two whistles and followed up this signal by such a change in her course as brought her head rapidly to the eastward until she was in a position almost directly across the stream, and was struck by the Yosemite at her forward gangway on a line nearly at right angles to her course with such force as to cut off her bow and sink her immediately.

Plaintiff alleged that the Yosemite was negligent in not having range lights; in that her red and green lights were dim; in not going to the left or the westward when the Vanderbilt gave two whistles, announcing her own intention of going to the left or to the eastward. The Yosemite claimed negligence on the part of the Vanderbilt in that when the latter was below the upper ice-house at Big Rock Point and both vessels were showing their red lights to each other, the Vanderbilt changed her course to the eastward and headed for Dinsmore's house, thus throwing herself across the path of the Yosemite; in that, when the two vessels exchanged signals of a single whistle, the Vanderbilt did not comply with the signal thus given, and go to the right, but continued her course to the left; in that the Vanderbilt, having the Yosemite on her starboard side, failed to keep out of the latter's way; in that, if the Vanderbilt was in doubt, she did not comply with the applicable rule by giving alarm whistles and slacking up her speed; in that the Vanderbilt, after complying with the signal whistle, changed her mind, blew two whistles, and took a sudden sheer to the left or eastward. It was admitted that the Yosemite did not have range lights, and in this particular the Court of Appeals held that she failed to comply with the law. It was insisted on behalf of the Yosemite that her sidelights were not dim, and that she could not go to the left when the two whistles of the Vanderbilt were heard because it was impossible for her to change her course at that moment in time to avoid the collision, and that the Vanderbilt had no right to blow the two whistles and go to the left after the interchange of signal whistles which determined that each should go to the right. There was evidence on behalf of the Vanderbilt tending to show that after she gave two whistles

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the Yosemite replied with two whistles; but on behalf of the Yosemite the evidence tended to show that she did not reply with two whistles, but began to give three whistles, and the collision occurred before she could do so.

The enrolment of the Vanderbilt was issued at the port of Albany, September 25, 1880, in conformity to Title Fifty of the Revised Statutes, entitled "Regulations of Vessels in Domestic Commerce," and stated, among other things, that she was built in 1857, was two hundred and seven feet long, and measured five hundred and eighty-five and seventy-four hundredths tons. Her license was issued October 3, 1881, to be employed in the coasting trade for one year from the date thereof and no longer. Her certificate of inspection was to the effect that she was inspected in the district of Albany, July 20, 1881, and that she was permitted to navigate for one year the waters of the Hudson River between Albany and New York, touching at intermediate points, a distance of about one hundred miles, and return, or any inland route. Among the particulars of inspection were enumerated that she had one watchman and had signal lights.

The Yosemite had a license under Title Forty-eight of the Revised Statutes, entitled "Regulation of Commerce and Navigation," dated May 27, 1882, describing her as of the burden of four hundred and eighty-one and fifty one-hundredths tons, used and employed exclusively as a pleasure vessel, and designed as a model of naval architecture. She was licensed to proceed from port to port of the United States and by sea to foreign ports, without entering or clearing at the custom house, but not allowed to transport merchandise or carry passengers for pay. This license was to continue and be in force for one year from the date thereof, or until the return of the yacht from a foreign port, and no longer. Her enrolment was under Section 4319, Title Fifty, and bore date January 20, 1881, and certified that she had two decks and two masts, that her length was one hundred and eighty-two feet, her breadth twenty-three and eight-tenths feet, her depth eighteen and seven-tenths feet, and that she measured as above given. Her certificate of inspection described her tonnage and accommo-

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dations and stated: "The said vessel is permitted to navigate for one year the waters of any ocean route between —— and touching at intermediate ports, a distance of —— miles and return." Among the particulars it appeared that she had one watchman, and signal lights.

The yacht was so constructed that she could be propelled by either the power of steam or sails, or by both, and at the time of the collision her sails were furled and she was propelled wholly by the power of steam. She had left City Island, eighteen miles from New York, about ten o'clock that forenoon, laid at New York until about three or four in the afternoon, and then left for Catskill.

The following are extracts from the Revised Statutes and the rules of the supervising inspectors:

"NAVIGATION.

"SEC. 4233. The following rules for preventing collisions on the water, shall be followed in the navigation of vessels of the Navy and of the mercantile marine of the United States:

"STEAM- AND SAIL-VESSELS.

"Rule one. Every steam-vessel which is under sail and not under steam, shall be considered a sail-vessel; and every steam vessel which is under steam, whether under sail or not, shall be considered a steam-vessel.

"LIGHTS.

"Rule two. The lights mentioned in the following rules, and no others, shall be carried in all weathers, between sunset and sunrise.

"Rule three. All ocean-going steamers, and steamers carrying sail, shall, when under way, carry —

"(A.) At the foremast head, a bright white light, of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, and so fixed as to throw the light ten points on each side of the vessel, namely,

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from right ahead to two points abaft the beam on either side.

"(B.) On the starboard side, a green light, of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, and so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side.

"(C.) On the port side, a red light, of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, and so fixed as to throw the light from right ahead to two points abaft the beam on the port side.

"The green and red lights shall be fitted with inboard screens, projecting at least three feet forward from the lights, so as to prevent them from being seen across the bow.

"Rule Four. Steam-vessels, when towing other vessels, shall carry two bright white mast-head lights vertically, in addition to their side lights, so as to distinguish them from other steam-vessels. Each of these mast-head lights shall be of the same character and construction as the mast-head lights prescribed by Rule three.

"Rule Five. All steam-vessels, other than ocean-going steamers and steamers carrying sail, shall, when under way, carry on the starboard and port sides lights of the same character and construction and in the same position as are prescribed for side lights by Rule three, except in the case provided in Rule six.

"Rule six. River steamers navigating waters flowing into the Gulf of Mexico, and their tributaries, shall carry the following lights, namely: One red light on the outboard side of the port smoke-pipe, and one green light on the outboard side of the starboard smoke-pipe. Such lights shall show both forward and abeam on their respective sides.

"Rule seven. All coasting steam-vessels, and steam-vessels

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other than ferry-boats and vessels otherwise expressly provided for, navigating the bays, lakes, rivers, or other inland waters of the United States, except those mentioned in Rule six, shall carry the red and green lights, as prescribed for ocean-going steamers; and, in addition thereto, a central range of two white lights; the after light being carried at an elevation of at least fifteen feet above the light at the head of the vessel. The headlight shall be so constructed as to show a good light through twenty points of the compass, namely: from right ahead to two points abaft the beam on either side of the vessel; and the after light so as to show all around the horizon. The lights for ferry-boats shall be regulated by such rules as the board of supervising inspectors of steam-vessels shall prescribe.

"Rule eight. Sail-vessels, when under way or being towed, shall carry the same lights as steam-vessels under way, with the exception of the white masthead lights, which they shall never carry.

"Rule nine. Whenever, as in case of small vessels during bad weather, the green and red lights cannot be fixed, these lights shall be kept on deck, on their respective sides of the vessel, ready for instant exhibition," etc.

"STEERING AND SAILING RULES.

"Rule eighteen. If two vessels under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

"Rule nineteen. If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side, shall keep out of the way of the other."

"Rule twenty-one. Every steam-vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steam-vessel shall, when in a fog, go at a moderate speed."

"Rule twenty-three. Where, by Rules seventeen, nineteen, twenty, and twenty-two, one of two vessels shall keep out

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of the way, the other shall keep her course, subject to the qualifications of Rule twenty-four.

"Rule twenty-four. In construing and obeying these rules, due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case rendering a departure from them necessary in order to avoid immediate danger."

Section 4214, in Title Forty-eight, reads:

"The Secretary of the Treasury may cause yachts used and employed exclusively as pleasure vessels, and designed as models of naval architecture, if entitled to be enrolled as American vessels, to be licensed on terms which will authorize them to proceed from port to port of the United States, and by sea to foreign ports, without entering or clearing at the custom house. Such license shall be in such form as the Secretary of the Treasury may prescribe. The owner of any such vessel, before taking out such license, shall give a bond, in such form and for such amount as the Secretary of the Treasury shall prescribe, conditioned that the vessel shall not engage in any unlawful trade, nor in any way violate the revenue laws of the United States, and shall comply with the laws in all other respects. Such vessels so enrolled and licensed shall not be allowed to transport merchandize or carry passengers for pay. Such vessels shall, in all respects, except as above, be subject to the laws of the United States, and shall be liable to seizure and forfeiture for any violation of the provisions of this Title."

By section 4412 it was provided that "the board of supervising inspectors shall establish such regulations to be observed by all steam-vessels in passing each other as they shall from time to time deem necessary for safety."

Inspectors' "Rules and regulations for the government of pilots navigating seas, gulfs, lakes, bays, sounds, or rivers, except rivers flowing into the Gulf of Mexico, and their tributaries."

"Rule 1. — When steamers are approaching each other

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'head and head,' or nearly so, it shall be the duty of each steamer to pass to the right, or port side of the other; and the pilot of either steamer may be first in determining to pursue this course, and thereupon shall give, as a signal of his intention, one short and distinct blast of his steam whistle, which the pilot of the other steamer shall answer promptly by a similar blast of his steam whistle, and thereupon such steamers shall pass to the right, or port side of each other. But if the course of such steamers is so far on the starboard of each other as not to be considered by pilots as meeting 'head and head,' or nearly so, the pilot so first deciding shall immediately give two short and distinct blasts of his steam whistle, which the pilot of the other steamer shall answer promptly by two similar blasts of his steam whistle, and they shall pass to the left, or on the starboard side, of each other.

"Note. — In the night, steamers will be considered as meeting 'head and head' so long as both the colored lights of each are in view of the other.

"Rule 2. — When steamers are approaching each other in an oblique direction (as shown in diagram of the fourth situation), they shall pass to the right of each other, as if meeting 'head and head,' or nearly so, and the signals by whistle shall be given and answered promptly as in that case specified.

"Rule 3. — If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage-way until the proper signals are given, answered, and understood, or until the vessels shall have passed each other."

"Rule 6. — The signals, by the blowing of the steam whistle, shall be given and answered by pilots, in compliance with these rules, not only when meeting 'head and head,' or nearly so, but at all times when passing or meeting at a dis-

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tance within half a mile of each other, and whether passing to the starboard or port."

The first seven rules of section 4233 are given, followed by diagrams illustrating the working of the system of colored lights in seven situations of meeting steamers, with observations.

Mr. Everett P. Wheeler, (with whom was *Mr. Lawrence Godkin* on the brief,) for plaintiff in error.

Mr. Peter Cantine, (with whom was *Mr. Emory A. Chase* on the brief,) for defendants in error.

I. This court has no jurisdiction. The plaintiff in error has not shown he has any right under a United States statute, which has been decided against him.

(*a*) The yacht having no colored lights that would show ahead, was not complying with the United States statutes. It was running with but one light, — the high foremast head white light, — without colored lights, that could be seen on the steamboat as the yacht was approaching her. This court cannot assume that the jury did not find that the want of these colored lights was not the cause of the collision. A general verdict will be upheld where there is evidence to sustain any finding of fact necessary to support the verdict. In the light of the issues, evidence, and verdict, the decision of the state court was not against the right, privilege, or immunity claimed under the laws of the United States, and the proceedings under the writ of error should be dismissed for want of the right to bring the case into this court, and the first assignment of error should be overruled.

(*b*) The yacht sailing on inland waters was controlled by local laws, and therefore no Federal statute was involved.

The yacht did not have the right to run on the Hudson River with a foremast head white light. The statute of New York, passed in 1826, and still contained in the Revised Statutes of that State, Title 10, Chapter 20, provides that, "whenever any steamer shall be navigating in the night time, the

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master of such boat shall cause her to carry and show two good and sufficient lights, one of which shall be exposed near her bows, and the other near her stern, and the last shall be at least twenty feet above the deck." This act is still in force. No navigation law of the United States has undertaken to supersede it.

The act "fixing certain rules and regulations for preventing collisions on the water," approved April 29, 1864, 13 Stat. 58, c. 69, is the act passed by the Congress of the United States adopting the international code. It is from this act that section 4233 of the Revised Statutes is codified, embracing such acts as have been passed since then and now appearing in section 4233.

There is nothing contained in the act of 1869 requiring whistles to be given. It is made up of articles instead of rules as in section 4233, and always uses the words "steamship" or "sailing ship." The body of the act carries out what was declared as the intention of Congress as gathered from the debates on this chapter, to relate to and regulate ocean navigation, and not inland navigation.

The act of March 3, 1885, 23 Stat. 438, c. 354, entitled "An act to adopt the Revised International Regulations for Preventing Collisions at Sea," enacts "That the following revised international rules and regulations for preventing collisions at sea shall be followed in the navigation of all public and private vessels of the United States upon the high seas and in all coast waters of the United States, except such as are otherwise provided for."

The second article in the rules provides what lights shall be carried in articles 3 to 11, both inclusive; changes the phraseology of all of them; and omits rules 5, 6, and 7 of section 4233.

The articles which correspond to certain of the rules in section 4233 are much more specific and fully stated. Article 15, which covers Rule 18, is particularly so. Article 16 is the same as Rule 19, and Article 18 is substantially the same as Rule 21. Articles 22 and 23 are in substance the same as Rules 23 and 24. This act provides for giving of whistles by Article 19,

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which is the first that provides for whistles in the International Code.

Local laws are reserved and excepted from the provisions of this act. Article 25 : "Nothing in these rules shall interfere with the operation of a special rule duly made by local authority relative to the navigation of any harbor, river, or inland navigation."

Section 2 provides: "That all laws and parts of laws inconsistent with the foregoing Revised International Rules and Regulations for the navigation of all public and private vessels of the United States upon the high seas and in all coast waters of the United States are hereby repealed, except as to the navigation of such vessels within the harbors, lakes, and inland waters of the United States, and this act shall take effect and be in force from and after the first day of September, *anno Domini* 1884."

The provision contained in rule 7 of section 4233, has been continued to be used in navigation, and was not repealed by this act of 1885.

The act of August 19, 1890, 26 Stat. 320, c. 802, entitled "An act to adopt regulations for preventing collisions at sea," enacts that "the following regulations for preventing collisions at sea shall be followed by all public and private vessels of the United States upon the high seas, and in all waters connected therewith navigable by sea-going vessels."

This act is divided into Articles, and is more comprehensive and specific than the act of 1885. It provides for a foremast-head white light, and also that an additional white light may be carried forward of the foremast-head white light and lower down. That will make a central range light.

This act also reserves and excepts from its operation local laws. Article 30: "Nothing in these rules shall interfere with the operation of a special rule duly made by local authority relative to the navigation of any harbor, river, or inland water."

Section 2. "That all laws or parts of law inconsistent with the foregoing regulations for preventing collisions at sea, for the navigation of all public and private vessels of the

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United States upon the high seas and in all waters connected therewith navigable by sea-going vessels are hereby repealed."

Section 3. "This act shall take effect at a time to be fixed by the President by proclamation issued for that purpose."

Rules 5, 6, and 7 of section 4233 are omitted from this act of 1890. The British rules, adopted in 1884, are identical with the act of 1885, and have been adopted by nearly every maritime power.

Why were these acts of 1885 and 1890 passed, leaving out rules 5, 6, and 7 from section 4233 of the Revised Statutes, and declaring in express terms, by the act of 1885, if it is only to apply to navigation upon the high seas and in all coast waters of the United States, except such as are otherwise provided for? For an answer to this question the court is referred to section 4235 of the Revised Statutes that "until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively enact for the purpose."

Thus we see that this judgment rests on the construction of the state statute of New York, and consequently this court has no jurisdiction to review it.

II. It was gross negligence in the yacht when in the second situation — running on a parallel line with the steamboat — to have given one whistle. She should have given two whistles: that would have required each vessel to have continued on her course. If the yacht wanted to cross the bow of the steamboat, she should have given a single whistle and procured the assent of the steamboat, in time to have enabled the vessels to pass in safety on a crossing course — which she did not do.

In all cases the signals by whistle first given, must be given in time to allow the other vessel to comply with and to pass as desired. If not so given in time, the vessel to which it is given is not bound by it although it may have accepted by an answering whistle. *The Voorwarts* v. *Khedive*, 5 App. Cas.

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876, 905; *The Wenona*, 19 Wall. 41, 42; *The Dexter*, 23 Wall. 69; *The Milwaukee*, Brown's Adm. 313; *The Aurania and The Republic*, 29 Fed. Rep. 98; *The Benares*, 9 P. D. 16; *The Beryl*, 9 P. D. 137, 140; *The America*, 92 U. S. 432, 437; *The Maggie J. Smith*, 123 U. S. 349, 355; *The City of New York*, 147 U. S. 72.

The yacht immediately on giving her single whistle changed her course to a crossing course in front of the bow of the steamer, without waiting for and obtaining an answer; this she had no right to do. *Chesapeake & Ohio Railway* v. *The Panama*, 46 Fed. Rep. 496; *The Hudson*, 14 Fed. Rep. 489; *The Britannia*, 34 Fed. Rep. 546.

If the single whistle which was answered as well as the two whistles which were answered were all given too late, then the yacht is in fault for having given the first whistle too late to initiate the manœuvre. The proposition made by the single whistle was a guarantee to the vessel to which it was given that it could be complied with in time. The answer to the first whistle was only an assent to be taken at the risk of the yacht, and if it could not be complied with, the responsibility remained with the yacht.

The steamboat is also free from blame under another rule that where one party suddenly puts another in jeopardy, *in extremis*, if the party so put in jeopardy uses his best judgment to avoid the collision, it is free from blame. *The Bywell Castle*, 4 P. D. 219; *The Beryl*, 9 P. D. 137; *McLaren* v. *Compagnie Française, &c.*, 9 App. Cas. 640; *The Blue Jacket*, 144 U. S. 371; *The Nacoochee*, 137 U. S. 330.

In any event, after the single whistle was given and answered it was competent for the parties to agree upon passing the other way by giving two whistles, these being answered. *Cooper* v. *Eastern Transportation Co.*, 75 N. Y. 116; (dismissed for want of jurisdiction, 99 U. S. 78); *Blanchard* v. *New Jersey Steamboat Co.*, 59 N. Y. 292.

It was also gross negligence for the yacht not to slow, stop, and back.

Rule 21 of Rev. Stat. § 4233, and Inspectors' Rule 3, each require, when the vessels have approached so near that danger

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of a collision is apprehended, that each vessel shall slow, stop, and back if necessary to avoid a collision; and Inspectors' rule 3 has it, that if the vessels shall have approached within a half a mile of each other, without having come to an agreement by whistles, or have failed to understand the intention of each other, they must slow, stop, back, etc. *The City of New York, ubi supra.*

III. The steamboat was not guilty of contributory negligence. The yacht gave a single whistle which was heard on the steamboat; and at that instant of time changed her course to cross the bow of the steamboat; and from that time to the time of the collision, was not more than probably one-half a minute. Therefore the assumption that they were approaching each other on oblique courses must be limited to the time subsequent to the time the yacht gave the single whistle which was heard on the steamboat.

The Inspectors' rules provide for signals to be given in each of the seven situations: When the signal is given which initiates the intended movement, that this movement shall be continued until it has been finally agreed upon and shall all be completed before either vessel undertakes to make the change. If the vessels were approaching on oblique courses, to make this rule apply they must have been running on these courses before the initial movement was made; if not, then the moment the initial movement was made produced another situation and required other signals to be given in that situation, and so you will go all around the circle of the seven situations without arriving at a completion of signals required by the rules to be given under such circumstances.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

We are of opinion that the writ of error was providently allowed, and that the jurisdiction of this court is clearly maintainable.

Plaintiff in error expressly claimed the right under the statutes of the United States to navigate the Yosemite on the Hudson with a masthead light and side lights in accordance

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with the statutory rules on that subject, and also the right in such navigation to the application of those rules in certain other particulars; and if these rights were denied, or either of them, the jurisdiction attached for the determination of the questions thus raised. It is of vital importance that these rules should be interpreted and enforced by the state courts in the same sense that they are in the courts of the United States. This action was for a maritime tort committed upon navigable waters and within the admiralty jurisdiction, and the appellate jurisdiction of this court over questions national and international in their nature cannot be restrained by the mere fact that the party plaintiff has elected to pursue his common law remedy in a state court.

The doctrine in admiralty of an equal division of damages in the case of a collision between two vessels when both are in fault contributing to the collision, has long prevailed in England and this country. *The Max Morris*, 137 U. S. 1. But at common law the general rule is that if both vessels are culpable in respect of faults operating directly and immediately to produce the collision, neither can recover damages for injuries so caused. *Atlee* v. *Packet Co.*, 21 Wall. 389.

In order to maintain his action, the plaintiff was obliged to establish the negligence of the defendant, and that such negligence was the sole cause of the injury, or, in other words, he could not recover, though defendant were negligent, if it appeared that his own negligence directly contributed to the result complained of.

(1) The particular fault imputed to the Yosemite was that she did not carry the range lights prescribed by Rule seven of the Rules of Navigation enacted by section 4233 of the Revised Statutes, and, this fact being admitted, it was ruled, as matter of law, that she was therefore guilty of negligence. The correctness of this ruling depends on whether, upon the true construction and application of those rules, the Yosemite came within Rule seven.

Under Rule two, the lights prescribed by the rules, and no others, are required to be carried in all weathers, between sunset and sunrise.

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By Rule three, "all ocean-going steamers, and steamers carrying sail, shall, when under way, carry," at the foremast head, a bright white light; on the starboard side, a green light; on the port side, a red light; all as described.

By Rule four "steam-vessels, when towing other vessels, shall carry two bright white masthead lights vertically, in addition to their side lights," of the same character and construction as the masthead lights prescribed by Rule three.

Rule five provided: "All steam-vessels, other than ocean-going steamers and steamers carrying sail, shall, when under way, carry on the starboard and port sides lights of the same character and construction, and in the same position as are prescribed for side lights by Rule three, except in the case provided in Rule six."

Rule six related to "river steamers navigating waters flowing into the Gulf of Mexico and their tributaries," and provided that they should carry the red and green lights on their starboard and port smoke pipes instead of on their sides.

By Rule eight, sail-vessels, when under way, or being towed, must carry the same lights as steam-vessels under way, but not the white masthead lights.

By Rule nine, vessels too small to have the green and red lights fixed upon their starboard and port sides shall have them ready "for instant exhibition."

Rule seven read: "All coasting steam-vessels, and steam-vessels other than ferry-boats, and vessels otherwise expressly provided for, navigating the bays, lakes, rivers, or other inland waters of the United States, except those mentioned in Rule six, shall carry the red and green lights as prescribed for ocean-going steamers; and in addition thereto a central range of two white lights; the after light being carried at an elevation of at least fifteen feet above the light at the head of the vessel. The headlight shall be so constructed as to show a good light through twenty points of the compass, namely: from right ahead to two points abaft the beam on either side of the vessel; and the after light so as to show all around the horizon. The lights for ferry-boats shall be regulated by such rules as the board of supervising inspectors of steam-vessels shall prescribe."

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The manifest object of this rule was the requisition of the range lights; but, out of abundant caution, and notwithstanding the provisions of Rule five, the mandate as to the red and green lights is repeated, and the range lights declared to be "in addition."

The importance attributed to the red and green lights is apparent throughout these rules and in the rules and regulations of the board of supervising inspectors. After diagrams are given in illustration of the working of the system of such lights, it is there said that by reference to them "it will appear evident that in any situation in which two vessels may approach each other in the dark, the colored lights will instantly indicate to both the relative course of each; that is, each will know whether the other is approaching directly or crossing the bows, either to starboard or port. This intimation, with the signals by whistle, as provided, is all that is required to enable vessels to pass each other in the darkest night with almost equal safety as in broad day."

Rule seven applied to coasting steam-vessels, and steam-vessels, other than ferry-boats and other than vessels otherwise expressly provided for, navigating inland waters, and excepting the river steamers mentioned in Rule six.

Steam-vessels not otherwise expressly provided for were those not expressly provided for in the matter of lights other than the red and green lights. Ocean-going steamers and steamers carrying sail and steam-vessels when towing other vessels were thus otherwise expressly provided for in Rules three and four. Rule five related wholly to the red and green lights, and did not expressly provide for other lights. Mississippi steamers were expressly excepted from the operation of Rule five, because, although they also carried red and green lights, these lights occupied a different position than in the instance of other steam-vessels; and Mississippi steamers were also expressly excepted from the operation of Rule seven, because under these rules they were to carry only red and green lights, and were, therefore, not otherwise expressly provided for in respect of lights other than the red and green lights. The rules were accurately drawn, and should not be

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deprived of their obvious application by refined construction.

To repeat: Ferry-boat lights were to be regulated by the board of supervising inspectors; all steam-vessels were to carry red and green lights, but differently placed on river steamers navigating the waters flowing into the Gulf of Mexico; coasting steam-vessels and steam-vessels engaged in inland navigation were governed by Rule seven; and vessels otherwise expressly provided for by the provisions thus made. And it was expressly provided that, in addition to the green and red lights, steam-vessels when towing other vessels should carry two bright white masthead lights vertically, and ocean-going steamers and steamers carrying sail should carry, when under way, at the foremast head, a bright white light, and no others.

It may be added that range lights were originally required by the statute of New York of 1826. Laws N. Y. 1826, c. 222, p. 253. Side lights were not then provided for, and there were practically no ocean-going steamers. When colored lights were introduced and changed conditions obtained, new rules became necessary and were adopted.

As to ocean-going steamers and steamers carrying sail, the bright white light required at the foremast head was to be "so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass," while as to coasting steamers, of the central range of two white lights prescribed, the after light was to be "at least fifteen feet above the light at the head of the vessel," and "to show all around the horizon."

The argument that by reason of the difference between the two classes, the lights required as to one class would be impracticable in respect of the other, is not without force, and indeed, on April 9, 1887, the Secretary of the Treasury approved the conclusion of the Supervising Inspector-General, that "the central range lights provided in Rule seven, Section 4233, Revised Statutes, are never to be used on ocean steamers, as the white light aft required by that rule would be obscured by the masts, yards, and rigging of such a steamer, and therefore useless." Treas. Dec. 1887, p. 200, No. 8168.

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Opinion of the Court.

The Yosemite was an "ocean-going steamer." She was constructed for and adapted to ocean navigation, had been upon the ocean, and had just been authorized "to navigate for one year the waters of any ocean route." She was also a "steamer carrying sail." She was none the less "ocean-going" because not at the time on the ocean, and none the less "carrying sail" because she was not at the time under sail. These terms were merely descriptive of her characteristics, and not of her situation. She was "under way," which words, in Rule three, would be superfluous if she must be traversing the ocean in order to be "ocean-going," and have her sails set in order to be "carrying sail;" and she was "under steam" and therefore not governed by the rules applicable to a steamer solely "under sail," by Rule one, a rule demonstrating that "under sail" and "carrying sail" were not used as synonymous terms.

In our judgment, the lights she was required to carry were expressly provided for in Rule three, and these lights she had.

The decision of the Court of Appeals that the Yosemite was bound to carry "a central range of two white lights," as prescribed in Rule seven, was based upon the ground that she was "in legal character and by nomenclature 'a coasting steam-vessel;'" and that, even if this might "not be absolutely true of the Yosemite in all situations, it was nevertheless true of her when navigating inland waters."

By the first section of the act of Congress of August 7, 1848, 9 Stat. 274, c. 141, the Secretary of the Treasury was authorized to cause yachts used and employed exclusively as vessels of pleasure, to be enrolled and licensed as vessels which were not required to qualify at the custom house; and this act was amended by that of June 29, 1870, 16 Stat. 170, c. 170, by inserting after the words "port to port of the United States" the words "and by sea to foreign ports," and as thus amended was carried forward into section 4214 of the Revised Statutes.

The Court of Appeals was of opinion that yachts licensed under the statute of 1848 were exclusively coasting vessels, and that, as by the act of 1870, they might be permitted to

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proceed by sea to foreign ports, they thus might have a double character, that is, of coasting vessels and vessels entitled to go upon the seas to foreign ports. Reference was made to the fact that the Yosemite was enrolled at the port of New York in conformity to Title Fifty of the Revised Statutes, entitled "Regulation of Vessels in Domestic Commerce," and was also licensed in pursuance of chapter two, Title Forty-eight, entitled "Regulations of Commerce and Navigation." And it was said that Title Fifty related exclusively to coasting and fishing vessels, while Title Forty-nine was entitled "Regulations of Vessels in Foreign Commerce." The conclusion was then announced that the Yosemite, being enrolled under the statute relating to coasting vessels, and her license being a coasting license, with the added privilege of being allowed to proceed to foreign ports, it did not seem to allow of reasonable doubt that the Yosemite while navigating the Hudson River was navigating under her license in the character of a coasting vessel.

We are unable to accept this conclusion. While Title Fifty is entitled by way of convenience "Regulation of Vessels in Domestic Commerce," there are many provisions contained under that title relating to vessels engaged in foreign commerce, and among them sections 4322 and 4323, which enable the owner of a coasting vessel to surrender his enrolment and register his vessel, or to surrender his register and take out an enrolment.

The register declares the nationality of a vessel engaged in foreign trade, the enrolment, the national character of a vessel engaged in the home traffic and enables her to procure a coasting license. By section 4318, under the same title, vessels navigating the waters of the northern, northeastern, and northwestern frontiers, otherwise than by sea, may be enrolled and licensed in such form as other vessels, and need not take out a certificate of registry. *The Mohawk*, 3 Wall. 566.

Ordinarily the terms "coaster" and "coasting vessel" are applied to vessels plying exclusively between domestic ports, and usually to those engaged in domestic trade as distinguished from vessels engaged in the foreign trade or plying between a

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port of the United States and a port of a foreign country. *Gibbons* v. *Ogden*, 9 Wheat. 1.

The mere fact that an ocean-going steamer may touch at some other port of the United States, after leaving her port of departure, would not make her a coaster, and this is recognized by section 4337, which is another of the sections included in Title Fifty worthy of notice.

Pleasure-yachts, designed as models of naval architecture, are not coasters in any statutory sense, for they are not allowed to transport merchandise or carry passengers for pay, and we do not think it reasonable to construe the words of the statute applicable to coasters as applicable to them in view of their character and the legislation upon the subject taken together.

As we have remarked, vessels engaged in domestic commerce may be transferred to the class of vessels authorized to sail to foreign ports by a change from an enrolment to a register; but, in the case of yachts, the statute provides that when entitled to be enrolled as American vessels, they may be authorized to proceed from port to port of the United States, and also by sea to foreign ports, so that, by a simple license, being mere pleasure-boats, not authorized to transact business, they may sail to either, but their essential character as ocean-going steamers, if they are such, remains the same, whether they are actually navigating from port to port of this country or to ports abroad.

The Yosemite was enrolled in 1881, and in May, 1882, took out the license which authorized her to proceed by sea to foreign ports and also from port to port in the United States. The privilege of doing both was granted, and her license no more authorized her to proceed to domestic ports, with the added privilege of going to foreign ports, than to proceed to foreign ports with the added privilege of navigating between domestic ports. She could do both, and to enable yachts to do so was the design and express language of the statute.

We have not deemed it necessary to discuss the supposed bearing of the act of February 28, 1871, 16 Stat. 440, 454, c.

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100, referred to by defendant in error, or the acts of 1864, 13 Stat. 58, c. 69, and of 1866, 14 Stat. 227, c. 234, as substantially the same question would arise under those acts, and the obscurity, if any, is not in the revised law.

Nor have we felt called upon to refer to the acts of March 3, 1885, 23 Stat. 438, c. 354, or that of August 19, 1890, 26 Stat. 320, c. 802, as this collision occurred in 1882.

We hold that Rule seven was not applicable to the Yosemite, and that therefore the Court of Appeals erred in affirming the judgment of the Supreme Court, which approved the instruction of the learned trial judge, (to which exception was duly saved,) that "the Yosemite, upon that occasion, was bound to have those lights which I have described to you as central range lights, and the absence of those statutory signals was, upon her part, negligence."

(2) In addition to the rules for preventing collisions, prescribed by section 4233, it was provided by section 4412 that "the board of supervising inspectors shall establish such regulations to be observed by all steam-vessels in passing each other, as they shall from time to time deem necessary for safety." The rules laid down by the latter as thus authorized have the force of statutory enactment, and their construction, (when put in evidence as they were in this case,) as well as that of the rules under section 4233, is for the court, whose duty it is to apply them as matter of law upon the facts of a given case. They are not mere prudential regulations, but binding enactments, obligatory from the time that the necessity for precaution begins, and continuing so long as the means and opportunity to avoid the danger remains. *The Dexter*, 23 Wall. 69. Obviously they must be rigorously enforced in order to attain the object for which they were framed, which could not be secured if the masters of vessels were permitted to indulge their discretion in respect of obeying or departing from them. Nevertheless it is true that there may be extreme cases where departure from their requirements is rendered necessary to avoid impending peril, but only to the extent that such danger demands. *The John L. Hasbrouck*, 93 U. S. 405; *The Sunnyside*, 91 U. S. 208; *The*

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Johnson, 9 Wall. 146; *The City of Washington*, 92 U. S. 31; *The Voorwarts & Khedive*, 5 App. Cas. 876; *The Byfoged Christensen*, 4 App. Cas. 669.

And while under Rule twenty-four, in construing and obeying the rules, due regard must be had to all dangers of navigation and to any special circumstances which may exist in any particular case, rendering a departure from them necessary in order to avoid immediate danger, the burden of proof lies on the party alleging that he was justified in such departure. *The Agra*, L. R. 1 P. C. 501; *The General Lee*, Irish L. R. 3 Eq. 155. Indeed, in *The Agra*, it was ruled that not only must it be shown that the departure at the time it took place was necessary in order to avoid immediate danger, but also that the course adopted was reasonably calculated to avoid that danger. And it is the settled rule in this court that when a vessel has committed a positive breach of statute, she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so. *The Pennsylvania*, 19 Wall. 125, 136; *Richelieu Navigation Co.* v. *Boston Ins. Co.*, 136 U. S. 408, 422.

Obedience to the rules is not a fault even if a different course would have prevented the collision, and the necessity must be clear and the emergency sudden and alarming before the act of disobedience can be excused. Masters are bound to obey the rules and entitled to rely on the assumption that they will be obeyed, and should not be encouraged to treat the exceptions as subjects of solicitude rather than the rules. *The Oregon*, 18 How. 570.

By Rule nineteen, "if two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

By the eighteenth, if two vessels under steam are meeting end on or nearly end on, so as to involve risk of collision, the helms of both must be put to port so that each may pass on the port side of the other.

This is repeated in Rule 1 of the inspectors' rules, and it is provided not only that when steamers are thus approaching

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each other, it shall be the duty of each to pass to the right, or port side of the other, but that the pilot of either may be first in determining to pursue this course, and thereupon shall give as a signal of his intention one short and distinct blast of his whistle, which the pilot of the other vessel shall answer by a similar blast, and thereupon said steamers shall pass to the port side of each other.

By Rule 2, when steamers are approaching each other in an oblique direction, (as shown in fourth situation,) they shall pass to the right of each other as if meeting "head and head," or nearly so, and the signals by whistles shall be given and answered promptly as in that case specified.

By Rule 3, if, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot, if in doubt, shall immediately signify the same by giving several short and rapid blasts of the steam whistle, and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed until the proper signals are given, answered, or understood, and until the vessels shall have passed.

It seems to us that these rules were strictly applicable, and were disregarded by the Vanderbilt. When the plaintiff rested, the defendant moved to dismiss, which was overruled, and it is contended here that on the plaintiff's own showing the Vanderbilt was palpably guilty of negligence which contributed directly to produce the collision, and hence that that motion should have been sustained; but we do not care to pass upon that question, and content ourselves with indicating certain errors in the rulings of the trial court, which appear to us to so essentially deprive the rules of the force which should have been given them as to amount to a decision against rights claimed under the statute of the United States. The speed of the Yosemite was about sixteen miles, and that of the Vanderbilt nine miles, an hour, and they were approaching each other, therefore, at an aggregate speed of twenty-five miles an hour. The pilot of the Vanderbilt testified that he saw the white light of the Yosemite when he was between the ice-houses,

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apparently a mile distant. The steamers were then on parallel courses. He did not see her green light at any time, but saw her red light just before or just after she blew two whistles. When he was abreast of the lower ice-house, he thought about a quarter of a mile from the place of collision, he headed her for Dinsmore's house, "way off to the eastward," and, believing that the Yosemite was a tow, laid his course more to the eastward. He was thus crossing the course of the Yosemite, which was brought on the starboard. At this point the pilot of the Yosemite gave a short and distinct blast from his whistle as required by law, as a signal of his intention to pass to the port side of the Vanderbilt, and this the pilot of the Vanderbilt answered by a similar blast, whereupon under the rules it became imperative for the steamers to pass to the port side of each other. The Vanderbilt was bound to go to the right after the bargain was made by the exchange of single whistles; but instead of doing this, and immediately after, the Vanderbilt's pilot gave two whistles, which it is claimed on behalf of the plaintiff were answered by two whistles from the yacht. This is denied by the latter; and even if true, an assent to the Vanderbilt's change was at the latter's risk. The Vanderbilt's pilot on the instant sheered his boat to port, then slowed, and the collision occurred, the Vanderbilt being struck nearly at right angles.

Among other instructions the court was requested by the defendant below to give, were these:

"8. As the proof is undisputed that the steamboat Vanderbilt and the yacht Yosemite were approaching each other head and head, or nearly so, the law prescribes their duties respectively in regard to blowing their whistles.

"9. If the yacht Yosemite, as the vessels were approaching each other, blew a single whistle and the steamboat Vanderbilt answered it by a single whistle, the course which she was thereupon bound to pursue was thereupon determined and each vessel was bound to pass to its own right, that is, to the port side of each other, which would have been the Vanderbilt to the west and the yacht Yosemite to the east.

"10. The pilot who first blew the first whistle thereby had

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the right to and did determine the course which each was then to adopt.

"11. The blowing of the single whistle by the steamboat Vanderbilt after the first single whistle from the yacht Yosemite was an acceptance by the steamboat Vanderbilt of the election of the course so adopted by the yacht Yosemite, and it then became the duty of the steamboat Vanderbilt to pass to the port or western side of the Yosemite."

"14. Even if the Vanderbilt, after having by one whistle accepted the one whistle of the yacht, had a right to change the conditions and course by a blast of two whistles, yet unless these two whistles were given in time to enable the yacht to go in safety to the west of the Vanderbilt, they would tend to complicate the situation, and the Vanderbilt was in that event guilty of negligence in giving the signal of two whistles."

These instructions were refused and the defendant excepted.

The court instructed the jury on this branch of the case that it was claimed on the part of the defendant that it was negligence for the Vanderbilt to blow the two whistles and to take the rank sheer and cross the bow of the Yosemite, and on the part of the plaintiff that at the time of the two signals being given it was impracticable to carry out the agreement which had been made by the signal which had been given and accepted of the one whistle; that he was compelled to give the two signals, and believed the Yosemite accepted his proposition that each should go to the left, while on the part of the defendant it was contended that two whistles were not blown in response, but that the pilot of the Yosemite started to blow three as a signal of danger and of repudiation of the offer made by the Vanderbilt, but before he could get them out the collision occurred; and the court left it to the jury to say whether the pilot of the Vanderbilt in attempting to change his course and to cross the bows of the Yosemite was guilty of negligence which contributed to the accident. Rule 3 was treated by the court in a similar way.

In short, the learned judge instructed the jury that it was for them to determine whether those who were in the management of the respective boats were guilty of negligence or

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not, and whether or not they did or omitted to do that which persons of ordinary care and prudence ought to have done; but in charging in this general way, and refusing to give the instructions above named, the obligatory force of the rules of navigation was substantially ignored.

The question whether, upon the proofs, the departure by the Vanderbilt from the rules was justified was not put to the jury, but whether upon the whole there was negligence in what was done or left undone. In this there was such error as the defendant may avail himself of in this court, so far as saved by his requests to charge.

If these two steamers were approaching each other head and head, or nearly so, or obliquely, as mentioned in Rule two, the law prescribed their duties respectively, and the jury should have been told so; and as there was no doubt that upon the exchange of single whistles the course each was bound to pursue was determined, the instructions to that effect should have been given. And so, if the Yosemite assented to the two whistles and the Vanderbilt's course, this, if an error, was one at the risk of the Vanderbilt, and at most would be an error in which both concurred, and if both were in fault, there could be no recovery. Of course, the test as to whether the departure from the rules was excusable, if there were clear and satisfactory evidence to that effect, might have been applied through proper instructions or qualifications on that subject, but as the case stood, we think those above quoted should have been given, and that the refusal to do so, taken with the actual instructions, erroneously disposed of a Federal right.

The judgment of the Court of Appeals is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE BROWN concurring.

While I fully concur in the opinion of the court that this case should be reversed upon the ground of the contributory negligence of the Vanderbilt, I think the Yosemite was guilty of a breach of the regulations in failing to carry the range

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lights provided by Rule seven, although it may be open to doubt whether such failure contributed to the collision, in view of the gross fault on the part of the Vanderbilt.

Rule seven, upon the construction of which the question turns, requires "all coasting steam-vessels and steam-vessels other than ferry-boats and vessels otherwise expressly provided for, navigating the . . . inland waters of the United States," to carry range lights. Were the Yosemite an ordinary coasting vessel, there could be no doubt of her obligation to be provided with these lights when navigating inland waters. She was, however, licensed under Rev. Stat. sec. 4214 as a yacht "used and employed exclusively as a pleasure-vessel, and designed as a model of naval architecture," on terms which authorized her "to proceed from port to port of the United States, and by sea to foreign ports, without entering or clearing at the custom house." She was enrolled under Rev. Stat. Title 50, which relates exclusively to coasting and fishing vessels. To put upon this statute (sec. 4214) the construction most favorable to her, it seems to me that she was invested with a double character: first, as an ocean-going steamer; and second, as a coasting vessel; and that, when navigating the inland waters of the country, she was bound to conform to the usages of those waters, and to carry the lights provided by law for "steam-vessels other than ferry-boats and vessels otherwise expressly provided for." Even admitting that ocean vessels when navigating inland waters are not bound to carry these range lights, because it is not contemplated that they shall navigate these waters, I am clearly of the opinion that yachts, which ply chiefly between ports and places within the United States and upon the inland waters of the country, should carry them. It seems to me an exceedingly dangerous practice, and one which, according to the theory of the Vanderbilt, had much to do with the collision in this case, to permit vessels not carrying the lights appropriate to inland navigation to navigate the narrow waters of the country. Vessels navigating those waters are entitled to expect that other vessels which they meet are required to carry the same lights which they carry,

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and any distinction in that particular in favor of yachts is liable to create uncertainty and confusion with regard to the character of the approaching vessel. While upon the ocean, I have no doubt her obligations would be discharged by carrying the white and colored lights provided by Rule three for ocean-going steamers, but while plying upon the Hudson River, I think she was navigating under her license as a coasting vessel, and should have carried the range lights required in inland navigation.

If the case required it, I would even go further and say, as did the dissenting judge when this case was heard before the general term, (34 Hun, 571, 577,) that ocean-going steamers when navigating the inland waters of the country, and not under sail, should carry the range lights provided by Rule seven. If this be not obligatory, I find it difficult to understand to what the words "steam-vessels other than ferry-boats and vessels otherwise expressly provided for" apply. There is an exception of ferry-boats which is easy to understand. There is, also, an exception of "vessels otherwise expressly provided for," which, in the opinion of the court, applies to ocean-going steamers, which are provided for by Rule three; but in my opinion these words should be construed as if reading "steam-vessels other than ferry-boats and vessels otherwise expressly provided for *in respect to inland navigation.*" After expressly excepting ferry-boats, which are of a limited class, it seems to me a violation of the rule of *ejusdem generis* that, under the words "vessels otherwise expressly provided for" should be exempted the very large class of ocean-going steamers, and, as observed by the dissenting judge of the general term, these words are perhaps used as words of caution, either as to present or future possible provisions. I have no doubt that ocean-going steamers are not obliged to carry range lights when ascending the waters of a river as far as their customary wharves near the mouth of such river; but if such steamers were in the habit of ascending the Hudson River as far as Albany, or the Mississippi as far as St. Louis, it would be exceedingly dangerous to permit them to navigate without the customary range lights provided for those waters. But,

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as before observed, it is unnecessary to place the liability of the Yosemite upon this broad ground.

MR. JUSTICE FIELD and MR. JUSTICE GRAY did not hear the argument, and took no part in the consideration and decision of this case.

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APPENDIX.

I.

In Memoriam.

SAMUEL BLATCHFORD, LL.D.

Mr. Justice Blatchford died at Newport, Rhode Island, on the 7th day of July, 1893.

On Friday, the 13th of October, 1893, the bar of the Supreme Court of the United States and the officers of the court met in the court room at the Capitol.

On motion of Mr. George F. Edmunds, Mr. Joseph H. Choate of New York was called to the chair, and Mr. James Hall McKenney, the Clerk of the Court, was invited to act as the Secretary of the meeting.

Mr. Choate, on taking the chair, addressed the meeting.

On motion of Mr. Julien T. Davies of New York, it was voted to appoint a committee to prepare and report resolutions for consideration. Mr. Julien T. Davies, Chairman, Mr. George F. Edmunds, Mr. Walter D. Davidge, Mr. George F. Hoar, Mr. J. M. Wilson, Mr. William A. Maury, Mr. Solomon Claypool, Mr. Solicitor General, and Mr. Calderon Carlisle were appointed as such committee. They reported the following resolutions:

Mr. Justice Blatchford has closed a judicial career of over twenty-five years. Appointed in 1867 to the bench, as District Judge for the southern district of New York, he brought to the discharge of his judicial duties capacity for labor and habits of exhaustive research acquired during his experience for nine years at the bar in the quiet town of Auburn, together with the qualities of promptness in dispatch of business and quickness of apprehension, that had been cultivated by thirteen years of active practice in the city of New York. His labors as District Judge will live in the shape and form that the law of bankruptcy and of admiralty received from his judicial hand. Later, from 1872 to 1882, as

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Circuit Judge, the law of patents especially owes much in its development to his patient research and faithful exposition. Appointed to the bench of the Supreme Court of the United States in 1882, he brought to the discharge of his high duties an intellect trained and disciplined by his former labors in directions especially adapted to increase his usefulness in his new sphere. In this great tribunal he was distinguished, as theretofore, for his careful study of his cases, his patient and full statements of facts, and his learned and luminous expositions of the law. Always he wrought to the full measure of his strength. He gave to the service of his chosen profession and of his country all that was best of himself. He concentrated all his energies upon his judicial duties. Neither pleasure nor change of mental occupation had much charm for him. His life work was the discharge of the functions of a judge, and all his powers were concentrated to this lofty end.

Resolved, That in the death of Mr. Justice Blatchford, his friends have lost a kind and amiable companion, his profession a conscientious and earnest brother, the Supreme Court of the United States a faithful, able, and industrious member, and the people of these United States an honest judge.

Resolved, That the Attorney General be requested to lay this minute and these resolutions before the court, and to ask that they be spread upon the record.

Resolved, That the chairman be requested to transmit a copy of them to the family of Mr. Justice Blatchford.

After appropriate remarks by Mr. Julien T. Davies, Mr. William A. Maury, and Mr. Calderon Carlisle, the meeting was dissolved.

On Monday, the 13th of November, 1893, the Attorney General, in compliance with the request of the meeting of the bar, addressed the court as follows:

The bar, may it please the court, have requested me to present the resolutions lately adopted by them upon the occasion of the death of Mr. Justice Blatchford. They are as follows [the Attorney General then read the resolutions, and continued]:

These resolutions — as I am sure the court will agree — justly estimate and express the loss sustained, not merely by the judiciary, not merely by the profession, but by the entire community as well. It does not follow that the community is necessarily or even probably sensible of its loss. Judge Blatchford bore his

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high honors so meekly, fulfilled his important functions so quietly and unostentatiously, as to attract to himself but slight notice from the public he so faithfully served. Nothing, indeed, was more alien to his thoroughly genuine nature than the mere trappings of office, than the notoriety and conspicuousness which, in these days of the interviewer and the illustrated daily press, so easily become the inseparable attendants of high station. Judge Blatchford was the model of a competent, well-trained, laborious, conscientious, and, above all, modest, public servant. It is not given to every man to be instinct with true genius, to exult in acknowledged intellectual superiority, to be chief among the chiefs of his chosen calling. Such men are rare, and their examples as often provoke despair as excite to emulation. But to every man it is given to make the most of the faculties that he has, to cultivate them with unflagging diligence, to make sure that they deteriorate neither from misuse nor disuse, but continue in ever growing strength and efficiency, until the inevitable access of years and infirmities inexorably bars all further progress. By such means alone, without the aid of any transcendent powers, it is astonishing to what heights men have climbed, what conquests they have made, and what laurels they have won. Judge Blatchford would have been the last to claim for himself those extraordinary gifts which have made some men seem to be called the giants of the law. But he had tireless industry, persistent application, a determination to work the powers he possessed to their utmost capacity, and the result is now seen in an honorable judicial career on the bench of the highest court of the country, and in an example full of encouragement and promise for every ambitious and struggling spirit. If it be asked what was Judge Blatchford's chief characteristic as a judge, it may be said to consist in the strictly business quality of his work. By that I do not merely mean that he was specially conversant with the multifarious affairs of trade, as daily transacted in the commercial centres of the world, and dealt with the questions arising out of them with peculiar intelligence and skill. No less could be expected of one who came to the bench from a successful practice in the commercial metropolis of the country. But his judicial work was businesslike, in that its sole aim was the right determination of the particular case in hand. He never made its decision an occasion for philosophic disquisition. He never undertook by an

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opinion in one case to settle principles for other anticipated cases. He never indulged in "large discourse looking before and after," much less in any flights of rhetoric. It satisfied his idea of judicial duty that the controversy before him was settled aright by the application of a rule of law broad enough to cover that case. Thus, if he was not brilliant, he was safe; if he did not make large contributions to the science of jurisprudence, he won respect for the law and its administration by the uniform righteousness of the results reached in actual causes. It must add to our admiration of Judge Blatchford that he toiled assiduously, both at the bar and on the bench, not from necessity, but from choice; that the allurements of an ample fortune neither belittled his aims nor benumbed his energies, and that in his hands wealth was but the supplement and aid to an industry and zeal rarely excelled even under the spur of poverty. His orderly, prosperous, and placid career, notable in itself, is even more so by contrast with that of his colleague on the bench whose death preceded his own by only a few months. Judge Blatchford rose to the highest of professional honors by unswervingly treading the beaten path of the law and by a regularly-graduated ascent, every stage of which, from country lawyer to city lawyer, from district judge to circuit judge, and from circuit judge to judge of the Supreme Court, was in natural and logical succession. Mr. Justice Lamar, on the other hand, was called to the like honors after a career of extraordinary vicissitudes, in which the life of the camp and the battlefield alternated with that of the forum and the hustings; almost without probation as a legal practitioner, but with a thorough theoretical and practical knowledge of great affairs of State and with a well-earned national renown as an orator, statesman, and leader of men. And nothing could better illustrate the wide scope and variety of the functions of this high tribunal than the fact that, notwithstanding their wholly diverse training and experience, each of them found here a fitting field for his own peculiar gifts and attainments, and each in his own line proved himself an accession and an ornament to the bench. I have the honor to ask that the resolutions of the bar be spread upon the records of the court.

The Chief Justice responded:

To Mr. Justice Blatchford the discharge of duty was an impulse, and toil a habit; and since to thorough training as a scholar

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and in professional practice, a wide and varied knowledge of the law, a keen and discriminating intellect, and an indomitable patience, he added "the transcendent capacity of taking trouble," the volume and extent of the work he was enabled to accomplish during twenty-six years of judicial life should occasion no surprise.

If his death admonishes us of the swiftness of the passage of time, his example teaches, through the results of the orderly method which regulated his every action, how time may be redeemed.

Mr. Justice Blatchford was at home in every branch of the jurisdiction of the courts in which he sat. It is not easy to distinguish, where all was done so well, but it may be justly said that he displayed uncommon aptitude in the administration of the maritime law and of the law of patents, his grasp upon the original principles of the one and his mastery of details in the other aiding him in largely contributing to the development of both. His experience in adjudication and in affairs bore abundant fruit during his incumbency of a seat upon this bench, and in the domain of constitutional investigation and exposition he won new laurels.

As suggested by the Attorney General, he did not attempt in his judgments to "bestow conclusions on after-generations," yet when the four hundred and thirty opinions, to be precise as he would have been, in which he spoke for the court, contained in the volumes of our reports from the latter part of the one hundred and fifth to the close of the one hundred and forty-ninth, are examined, it will be found that he dealt with large questions, in many of them, with a breadth and luminousness of treatment, and at the same time with a circumspection and sagacity, which entitle them to high rank as judicial compositions, and will make them monuments to be seen hereafter of those concerned in looking about them for guidance in the present by the wisdom of the past.

And, as rightly indicated in the thoughtful tributes paid to him to-day, the memory of this conscientious and faithful public servant will be perpetuated, not through his decisions alone, but in the profound conviction, the contemplation of his career will ever produce, that he kept, to use the language of another, the great picture of the useful and distinguished judge "constantly before his eyes, and to a resemblance of which all his efforts, all his thoughts, all his life were devoted."

Upon the loss to us personally in parting with this beloved friend and helpful fellow-laborer we do not care to dwell. We

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take up our burdens again, conscious of the absence of the relief his participation would have afforded, but feeling as to him the truthfulness of the thought: "Above all, believe it, the sweetest canticle is *Nunc Dimittis*, when a man hath obtained worthy ends and expectations."

The minute and resolutions of the bar and the remarks of the Attorney General will be entered on our records, and as a further mark of respect the court will adjourn until to-morrow at the usual hour.

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II.

AMENDMENT TO RULES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

It is ordered that clause 6 of Rule 21 be, and it is, amended by substituting therefor the following:

6. When no oral argument is made for one of the parties, only one counsel will be heard for the adverse party.

(Promulgated December 11, 1893.)

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III.

ASSIGNMENT TO CIRCUITS.

SUPREME COURT OF THE UNITED STATES.

IN VACATION.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this court among the circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz.:

For the First Circuit, HORACE GRAY, Associate Justice.
For the Second Circuit, HORACE GRAY, Associate Justice.
For the Third Circuit, GEORGE SHIRAS, JR., Associate Justice.
For the Fourth Circuit, MELVILLE W. FULLER, Chief Justice.
For the Fifth Circuit, HOWELL E. JACKSON, Associate Justice.
For the Sixth Circuit, HENRY B. BROWN, Associate Justice.
For the Seventh Circuit, MELVILLE W. FULLER, Chief Justice.
For the Eighth Circuit, DAVID J. BREWER, Associate Justice.
For the Ninth Circuit, STEPHEN J. FIELD, Associate Justice.

July 15, 1893.

(Signed) MELVILLE W. FULLER,
Chief Justice of the United States.

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INDEX.

ABATEMENT.

The rule that the death of a party to a suit, either pending the suit or after judgment and before execution, abates the suit, does not apply to a case where land has been sold upon execution, but no deed delivered. *Insley* v. *United States*, 512.

ACCORD AND SATISFACTION.

See PLEADING, 2.

ADMIRALTY.

1. This court has jurisdiction to review the judgment of the highest court of a State in an action at common law to recover damages caused by the collision of two steamers navigating inland waters over which the United States have admiralty jurisdiction, when that judgment denies rights claimed by the plaintiff in error under rules established by statutes of the United States for preventing collisions, or rights regarding the application of such rules. *Belden* v. *Chase*, 674.
2. A steam pleasure-yacht is an "ocean-going steamer," and is not a "coasting vessel." *Ib.*
3. A steam pleasure-yacht, on the inland waters of the United States, is bound, when under way, to carry at the foremast head a bright white light, on the starboard side a green light, and on the port side a red light, as prescribed by Rule 3 in Rev. Stat. § 4233; and is not required to carry "in addition thereto a central range of two white lights," as prescribed by Rule 7 of that section for "coasting steam-vessels . . . navigating the bays, lakes, rivers, or other inland waters of the United States," that rule not being applicable to a steam pleasure-yacht. *Ib.*
4. Regulations established by a board of supervising inspectors, under Rev. Stat. § 4412, "to be observed by all steam-vessels passing each other," have the force of statutory enactment; are obligatory from the time when the necessity for caution begins; and continue so while the means and opportunity to avoid the danger remain. *Ib.*
5. When a vessel, meeting or passing another vessel, departs from the rules laid down by the supervising inspectors, and a collision results, the burden of proof is on it to show that the departure was made necessary by immediate, impending, and alarming danger. *Ib.*
6. When a vessel has committed a positive breach of statute, she must not only show that her fault did not probably contribute to a disaster which followed, but that it could not have done so. *Ib.*

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7. Two steamers on the Hudson River at night were approaching each other head and head. One gave a short blast from its whistle to indicate an intention to pass on the port side. The other answered by a similar blast, and then gave two whistles, and changed its course so as to cross the bow of the first vessel. This resulted in a collision whereby the second vessel was sunken. An action at law was brought in a state court by the owners of the sunken vessel against the owners of the first vessel. On the trial the court was asked to instruct the jury that the pilot who first blew the sharp whistle had the right to determine the course which each was to adopt; that the answer by a single whistle was an acceptance of his determination, and that it then became the duty of the second vessel to pass the other according to that determination; and that the second vessel was guilty of negligence in giving the two whistles and in changing its course. The court refused these instructions, and instructed the jury, in substance, that they were to determine whether those in management of the vessels were guilty of negligence or not, and whether they did or omitted to do that which persons of ordinary care and prudence ought to have done. *Held:* (1) That in refusing to give the instructions asked for and in charging in this general way, the obligatory force of the rules of navigation was substantially ignored; (2) That the instruction did not put to the jury the question whether the second vessel was justified in departing from the rules, which was error; (3) That the jury should have been told that two vessels approaching, head to head, and exchanging the signal of a single whistle, were bound to pursue the course prescribed by the rules; (4) And that they should have been further instructed that if the first vessel assented to the signal of the two whistles, and there was error in the course, it was at the risk of the second vessel, or, at the most, both were in fault and there could be no recovery. *Ib.*

See DAMAGES;
JURISDICTION, A, 24; D, 1.

ADVERSE POSSESSION.

See EJECTMENT, 1, 2;
EQUITY, 2, (5), 3.

ALASKA.

1. The commissioners appointed by the governments of the United States and of Russia for the transfer of Alaska under the treaty of March 30, 1867, 15 Stat. 539, had no power to vary the language of the treaty or to determine questions of title or ownership. *Kinkead* v. *United States*, 483.
2. The building constructed by the Russian-American Company in 1845 on land belonging to Russia became thereby, so far as disclosed by the

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facts in this case, the property of the Russian government, and, being transferred to the United States by the treaty of March 30, 1867, no property or ownership in it remained in the Russian-American Company, which it could transfer to a private person adversely to the United States. *Ib.*

APPEAL.

1. An order allowing an appeal to this court is, so long as the appeal remains unperfected and the cause has not passed into the jurisdiction of the appellate tribunal, subject to the general power of a Circuit Court over its own judgments, decrees, and orders during the existence of the term at which they are made. *Aspen Mining & Smelting Co.* v. *Billings*, 31.
2. If a motion or petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion is disposed of. *Ib.*
3. No appeal lies to this court from a judgment of a Circuit Court in execution of a mandate of the Circuit Court of Appeals. *Ib.*
4. When an appeal is allowed in open court, and perfected during the term at which the decree or judgment appealed from was rendered, no citation is necessary. *Jacobs* v. *George*, 415.
5. When an appeal is allowed at the term of the decree or judgment, but is not perfected until after the term, a citation is necessary to bring in the parties; but if the appeal be docketed here at the next ensuing term, or the record reaches the clerk's hands seasonably for that term, and legal excuse exists for lack of docketing, a citation may be issued, by leave of this court, although the time for taking the appeal has elapsed. *Ib.*
6. When an appeal is allowed at a term subsequent to that of the decree or judgment appealed from, a citation is necessary; but it may be issued, properly returnable even after the expiration of the time for taking the appeal, if the allowance of the appeal were made before. *Ib.*
7. A citation is one of the necessary elements of an appeal taken after the term, and if it be not issued and served before the end of the next ensuing term of this court, and be not waived, the appeal becomes inoperative. *Ib.*

ANCILLARY PROCEEDINGS.

See EQUITY, 2, (1).

BAILMENT.

See CONTRACT, 2.

BANK.

A bank, knowing that the county treasurer of the county had not sufficient county funds in his hands to balance his official accounts, consented to

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give him a fictitious credit in order to enable him to impose upon the county commissioners, who were about to examine his accounts. They accordingly gave him a "cashier's check" for $16,571.61, which he endorsed and took to the commissioners. They received it, but refused to discharge him or his bondsmen, and placed the check and such funds as he had in cash in a box and delivered them to his bondsmen. The latter deposited the money and the check in another bank in the same place, which bank brought suit against the bank which issued the check to recover upon it. *Held*, (1) That the circumstances under which the check was issued were a plain fraud upon the law, and also upon the county commissioners; (2) That their receipt of it and turning it over to the sureties was a single act, intended to assist the sureties in protecting themselves, and was inconsistent with the idea of releasing them from their obligation; (3) That the question whether the evidence did or did not establish the fact that the county was an innocent holder should have been submitted to the jury. *Thompson* v. *Sioux Falls National Bank*, 231.

See EVIDENCE, 7.

BONA FIDE HOLDER.

See BANK;
EVIDENCE, 7.

BOUNDARY.

In an action to try the title to land, where there is conflicting evidence as to certain natural objects named in running the lines, an instruction to the jury that if, after fully considering the conflicting evidence they are left doubtful and uncertain, they will be justified in locating the grant by referring to such of the natural objects as are certain, is not error. *New York & Texas Land Co.* v. *Votaw*, 24.

CASES AFFIRMED OR FOLLOWED.

1. In this case the court follows its rulings in No. 3, *ante*, 1. *United States* v. *Denver & Rio Grande Railway*, 16.
2. This case is dismissed upon the authority of *Chapman* v. *Goodnow's Administrator*, 123 U. S. 540. *Wells* v. *Goodnow's Administrator*, 84.
3. This case is not distinguishable in principle from *United States Trust Company* v. *Wabash Western Railway Company*, 150 U. S. 287. *Seney* v. *Wabash Western Railway*, 310.
4. *Dean* v. *McDowell*, 8 Ch. D. 345, approved and followed. *Latta* v. *Kilbourn*, 524.

See COURT-MARTIAL;
EVIDENCE, 6;
JURISDICTION, A, 23;
PATENT FOR INVENTION, 12;
PUBLIC LAND, 6;
RAILROAD, 2, (2).

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CASES DISTINGUISHED.

1. *Evans* v. *State Bank*, 134 U. S. 330, distinguished from this case. *Aspen Mining & Smelting Co.* v. *Billings*, 31.
2. *Case* v. *Beauregard*, 101 U. S. 688. *Sanger* v. *Upton*, 91 U. S. 56, and *Terry* v. *Anderson*, 95 U. S. 628, distinguished; and shown not to conflict with the subsequent cases of *Wabash, St. Louis & Pacific Railway* v. *Ham*, 114 U. S. 587; *Fogg* v. *Blair*, 133 U. S. 584; and *Hawkins* v. *Glenn*, 131 U. S. 319. *Hollins* v. *Brierfield Coal & Iron Co.*, 371.

CASES EXPLAINED.

United States v. *Langston*, 118 U. S. 389, explained and limited. *Belknap* v. *United States*, 588.

CHATTEL MORTGAGE.

See CONTRACT, 1.

CIRCUIT COURT COMMISSIONER.

See FEES, 2, 3.

CLOUD UPON TITLE.

See EQUITY, 2, (2).

COMMON CARRIER.

1. Where a bill of lading provides that in case of loss the carrier, if liable for the loss, shall have the benefit of any insurance that may have been effected on the goods, this provision limits the right of subrogation of the insurer to recover over, against the carrier, upon paying to the shipper the loss. *Wager* v. *Providence Insurance Co.*, 99.
2. Where the carrier is actually and in terms the party assured, the underwriter can have no right to recover over against the carrier, even if the amount of the policy has been paid by the insurance company to the owner, on the order of the carrier. *Ib.*
3. The claim of the master of the vessel, through whose loss the loss of the goods insured took place, to exemption from liability to the insurance companies having been adjudicated against him, and the appeal to this court on that judgment having been dismissed for want of jurisdiction, he is estopped from again setting up that claim in this case. *Ib.*

CONFLICT OF LAW.

The possession of property by the judicial department, whether Federal or state, cannot be arbitrarily encroached upon, without violating the fundamental principle which requires coördinate departments to refrain from interference with the independence of each other. *In re Swan, petitioner*, 637.

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CONSPIRACY.

See EVIDENCE, 6.

CONSTITUTIONAL LAW.

The act of February 26, 1885, 23 Stat. 332, c. 164, prohibiting the importation of aliens under contract to perform labor in the United States is constitutional. *Lees* v. *United States*, 476.

See JURISDICTION, A, 12 to 16.

CONTEMPT.

S. claiming to act as a constable in the State of South Carolina, and to act under the statute of that State touching intoxicating liquors known as the Dispensary Act, seized without warrant and carried away a cask of liquor which had been brought into the State by a receiver operating a railroad under authority of the Circuit Court of the United States for that district, and was held by him as an officer of that court, awaiting its delivery to the consignee. The receiver applied to the court which appointed him, setting forth the facts, and praying that S. be attached and punished for contempt, and be required to restore the property. A rule to show cause issued and S. appeared and made answer. The court adjudged him to be guilty of contempt, ordered him to be imprisoned until he return the property, and when that should be done that he be imprisoned for a further period of three months, and until he should pay the costs. *Held*, (1) That the Circuit Court had jurisdiction: (2) That its determination that the act of S. was illegal, and that he was in contempt, was not open to review in this proceeding; (3) That it was not necessary to determine whether he could be required to pay the costs, as he had not yet restored the goods, nor suffered the three months' imprisonment. *In re Swan, petitioner*, 637.

See WITNESS, 1.

CONTRACT.

1. A number of horses, mortgaged to secure the payment of a promissory note of their owner given to the mortgagee, were, under the provisions of a statute of Montana relating to chattel mortgages, sold by a sheriff on the maturity of the note without payment. With the assent of the attorney of the mortgagee, who was present at the sale, the purchaser paid a part of the purchase price in cash, and left the horses with the sheriff as security for payment of the remainder in five days. On the expiration of that time he failed to pay the balance. The attorney refused to receive the sum paid in cash and the horses as security for the remainder; but the principal received the amount paid in cash, and sued the sheriff and his bondsmen to recover the remainder. *Held*, that he could not repudiate the transaction in part and ratify it in part; and that having ratified it in part by the

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receipt of the sum paid in cash, he could not maintain this action. *Rader* v. *Maddox*, 128.

2. In 1867 B. and S. entered into a contract which was evidenced by the following writings, signed by them respectively. (1) B. to S., dated September 18: "Enclosed please find our bill of sundry arms, etc., amounting to $39,887.60, for which amount please give us credit on consignment account. As mutually agreed, we consign these arms to your care, to be shipped to Mexico and to be sold there by you to the best advantage. Should these arms not be disposed of at the whole amount charged, we have to bear the loss. Should there be any profit realized over the above amount of bill, such profit shall be equally divided between yourself and us. Also, it is understood that all these goods are shipped by you free of any expenses to us, and that in case all or any of them should not be sold, they shall be returned to us free of all charges. As you have insured these goods, as well as other merchandise, we should be pleased to have the amount of $40,000 transferred to us. Please acknowledge the receipt of this, expressing your acquiescence in above, and oblige." Accompanying this was an invoice headed "S. in joint account with B." To this S. replied the same month: "I have the honor to acknowledge the receipt of your letter of the 18th inst., in which you enclose bill of sundry arms, amounting to $39,887.60, consigned to me upon certain conditions contained in said letter. In reply I have to say that I accept the terms of said conditions of consignment, and as soon as I obtain the policies of insurance upon said goods will transfer them to you." In October B. wrote S.: "Enclosed we beg to hand you our bill for muskets, amounting to $10,175, for which please give us credit on consignment account. As mutually agreed, we consign these arms to your care, to be shipped to Mexico, and to be sold there by you to the best advantage. Should these arms not be disposed of at the amount charged, we have to stand the loss. Should there be any profit realized over the amount, such profit shall be equally divided between yourself and us. It is also understood that these goods shall be shipped by you free of any expenses to us, and that in case they should not find a ready sale, they shall be returned to us free of all charges. Please attend to the insurance of this lot and have the amount transferred to us in one policy; also please acknowledge the receipt of this, stating your acquiescence in above." Accompanying this was an invoice headed: "S. bought of B. in joint account." The goods were shipped for their destination in Mexico. S. took out policies of insurance on the September shipments in his own name "for account of whom it might concern," which policies were handed to B. by direction of S. The October shipments reached their destination. A large part of the September shipments was lost. B. collected the insurance on such of the policies as were in his hands. *Held*, (1) That the contract was not a contract of sale of the goods

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by B. to S., but a bailment upon the terms stated in the correspondence, and as it was clearly expressed in the writings between the parties, it could not be varied by the terms of the printed bill-head of the invoice; (2) That S., as bailee, was exempted by the common law from liability for loss of the consigned goods arising from inevitable accident; (3) That there was no undertaking in the contract on his part which took him out of the operation of the common law rule; (4) That the taking of the policies of insurance in his own name by S. did not tend, under the circumstances, to establish that he recognized his liability for the loss of the goods, as it was clear that, under a policy running to S. "for account of whom it might concern," B. could show and recover, in event of loss, his interest, which was a substantial one: (5) That certain statements made by S. did not amount to an estoppel, the rule being that a statement of opinion upon a question of law, where the facts are equally well known to both parties, does not work an estoppel. *Sturm* v. *Boker*, 312.

3. An employé in the Treasury Department, having obtained letters patent for an invention which proved to be of use in the department, executed an indenture to the department in which he said: "For the sum of one dollar and other valuable consideration to me paid by the said department, I do hereby grant and license the said United States Treasury Department and its bureaus the right to make and use machines containing the improvements claimed in said letters patent to the full end of the term for which said letters patent are granted." *Held*, that this instrument constituted a contract fully executed on both sides, which gave the right to the Treasury Department, without liability for remuneration thereafter, to make and use the machines containing the patented improvements to the end of the term for which the letters were granted; which contract could not be defeated, contradicted, or varied, by proof of a collateral parol agreement inconsistent with its terms. *McAleer* v. *United States*, 424.

4. The owners of a mine leased it to parties who agreed to pay certain royalties upon its products. The lease contained a further provision that "in case the royalty due and payable to the parties of the first part according to the above rates shall in any year fall below the sum of one thousand dollars, then the party of the second part shall pay to the parties of the first part such additional sum of money as shall make the royalty for such year amount to the sum of one thousand dollars, which sum shall be held and taken to be the royalty for that year: *Provided always*, That if sufficient ores cannot be found to yield said minimum payment, and said party of the second part shall in consequence thereof fail to pay said minimum sum of one thousand dollars yearly, then said party of the second part shall, if required by said parties of the first part, relinquish this lease and the privileges hereby granted, and the same shall cease thereupon." *Held*, that the lessees engaged to pay, as rent, in each year, the royalties fixed in the

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lease; and if, in any year, the royalties fell below the sum of one thousand dollars, they were to make up the deficit, so that the latter sum should, in any event, be paid annually as rent. *Lehigh Zinc & Iron Co.* v. *Bamford*, 665.

See EQUITY 3;
FRAUDULENT REPRESENTATIONS;
PARTNERSHIP, 3.

COLLISION.

See ADMIRALTY.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CORPORATION.

1. The trustee of a mortgage upon the real estate of an Alabama corporation commenced a suit in the Circuit Court of the United States for the foreclosure of the mortgage. In his bill he set up that some stockholders were liable for unpaid assessments on their stock, and, while asking for a foreclosure of the mortgage and sale of the property, he prayed that other creditors of the corporation might be permitted to intervene and become parties, and have their claims adjudicated, and that a full administration be had of the estate. About three months after the commencement of that suit, a contract creditor, who had not reduced his claim to judgment, filed his bill in equity in the same court, suing for his own benefit and that of all creditors who should become parties, asking to have the mortgage declared void, to have the property sold, and the proceeds applied to the payment of the debts of the creditors, parties to the suit, and for a liquidation. The plaintiff in the second suit did not intervene in the foreclosure suit. In due course a decree was entered in the foreclosure suit for the sale of the property. The court then entered a decree dismissing the creditor's bill upon the merits. *Held*, that this was error, and that the bill should have been dismissed for want of jurisdiction. *Hollins* v. *Brierfield Coal & Iron Co.*, 371.

2. Simple contract creditors of a corporation, whose claims have not been reduced to judgment, and who have no express lien on its property, have no standing in a Federal court of equity, to obtain the seizure of their debtor's property, and its application to the payment of their debts. *Ib.*

3. This rule is not affected by the fact that a statute of the State in which the property is situated, and in which the suit is brought, authorizes such a proceeding in the courts of the State, because the line of demarcation between equitable and legal remedies in the Federal courts cannot be obliterated by state legislation. *Ib.*

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4. This rule is not affected by the fact that when such a suit is brought in a Federal court, another suit is pending there for the foreclosure of a mortgage upon the property of the corporation. *Ib.*
5. In such case the defence that the rights of the plaintiff at law should have been exhausted before commencing proceedings in equity is a defence which must be made *in limine*, and, if not so made, the court of equity is not necessarily ousted of jurisdiction. *Ib.*
6. Neither the insolvency of a corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor all together give to a simple contract creditor of the corporation any lien on its property, or charge any direct trust thereon. *Ib.*
7. When a corporation becomes insolvent, the equitable interest of the stockholders in the property and their conditional liability to creditors, place the property in a condition of trust, first for creditors, and then for stockholders; but this is rather a trust in the administration of the assets after possession by a court of equity, than a trust, attaching to the property, as such, for the direct benefit of either creditor or stockholder. *Ib.*

See JURISDICTION, C, 2;
MANDAMUS, 3;
SERVICE OF PROCESS.

COSTS.

When costs are unnecessarily increased by the incorporation of useless papers, costs may be imposed upon the offending party under Rule 10, Paragraph 9; and they are imposed in this case. *Ball & Socket Fastener Co.* v. *Kraetzer*, 111.

See CONTEMPT.

COTENANT.

Cotenants stand in a relation of mutual trust and confidence towards each other, and a purchase by one of an outstanding title or incumbrance, for his own benefit, inures to the benefit of all, and when acquired, is held by him in trust for the true owner. *Turner* v. *Sawyer*, 578.

COURT AND JURY.

1. A statute of Arkansas, Digest of 1884, 425, c. 45, § 1498, provides that "an infant under twelve years of age shall not be found guilty of any crime or misdemeanor." The courts of that State have held, *Dove* v. *State*, 37 Arkansas, 261, that the common law presumption that a person between the ages of twelve and fourteen is incapable of discerning good from evil, until the contrary be affirmatively shown, still prevails. A homicide was committed in May. A young person, charged with the commission of it, testified on his trial in the Circuit Court for the Western District of Arkansas, in the following February, that he would be fifteen years old the coming March. The court charged the jury that the *prima facie* presumption as to lack of accountability ter-

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minated at eleven years of age. *Held*, that, although the accused by his testimony had shown that he had passed the age of fourteen when the crime was committed, yet, as the mistake might have prejudiced him with the jury, it was error. *Allen* v. *United States*, 551.

2. To direct the attention of the jury to the contemplation of the philosophy of the mental operations, upon which justification, or excuse, or mitigation in the taking of human life may be predicated, is to hazard the substitution of abstract conceptions for the actual facts of the particular case, as they appeared to the defendant at the time. *Ib.*
3. When the defence, in a case of homicide, is justification, or excuse, or action in hot blood, the question is one of fact which must be passed upon by the jury in view of all the circumstances developed in evidence, uninfluenced by metaphysical considerations proceeding from the court. *Ib.*
4. The question whether the defendant in a capital case exceeded the limits of self-defence, or whether he acted in the heat of passion, is not to be determined by the deliberation with which a judge expounds the law to a jury, or with which a jury determines the facts, or with which judgment is entered and carried into execution. *Ib.*

See BANK;
NEGLIGENCE.

COURT-MARTIAL.

The proceedings of a court-martial held upon a captain of infantry in the army of the United States, which resulted in a judgment of dismissal from the service, having been transmitted to the Secretary of War "for the action of the President of the United States," the Secretary endorsed upon them that, "in conformity with the sixty-fifth of the rules and articles of war, the proceedings of the general court-martial in the foregoing cause . . . have been forwarded to the Secretary of War for the action of the President of the United States, and the proceedings, findings, and sentence are approved, and the sentence will be duly executed," and signed the endorsement officially as Secretary of War. *Held*, on the authority of *United States* v. *Fletcher*, 148 U. S. 84, that this was a sufficient authentication of the judgment of the President, and that there was no ground for treating the order as null and void for want of the requisite approval. *Ide* v. *United States*, 517.

COURT OF CLAIMS.

See NEW TRIAL, 3, 4.

CREDITORS' BILL.

See JURISDICTION, C, 5, 6.

CRIMINAL LAW.

1. On the trial of a person indicted for murder, it appeared that the deceased in a drunken fit assaulted the brother of the defendant,

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that the defendant, who was dancing, left the dance, went in search of his pistol, returned with it and shot the offender, and that after going away, he returned a few minutes later, put the pistol close to the head of the deceased and fired a second time. The court below instructed the jury, in substance, that, if the defendant in a moment of passion, aroused by the wrongful treatment of his brother, and without any previous preparation, did the shooting, the offence would be manslaughter; but if he prepared himself to kill, and had a previous purpose to do so, then the mere fact of passion would not reduce the crime below murder. *Held*, that there was no error in this instruction. *Collins* v. *United States*, 62.

2. Upon a trial for murder in Arkansas, on cross-examination of witnesses to the defendant's character, and by his own testimony to meet evidence that he had since fled to Mississippi, it appeared that he had killed a negro in Mississippi two years before, and had since been tried and acquitted there. The district attorney, in his closing argument to the jury, said: "We know, from reading the newspapers and magazines, that trials in the State of Mississippi of a white man for killing a negro are farces. The defendant came from Mississippi with his hands stained with the blood of a negro." And he added other like expressions and declarations that the killing of a negro in Mississippi, for which the defendant had been tried and acquitted there, was murder. To all these declarations, expressions, and arguments of the district attorney, the defendant at the time objected, and, his objections being overruled by the court, alleged exceptions. *Held*, that he was entitled to a new trial. *Hall* v. *United States*, 76.

3. Where objection is made in a criminal trial to comments upon facts not in evidence or statements having no connection with the case or exaggerated expressions of the prosecuting officer, it is the duty of the court to interfere and put a stop to them if they are likely to be prejudicial to the accused. *Graves* v. *United States*, 118.

4. The wife of a person accused of crime is not a competent witness, on his trial, either on his own behalf or on the part of the government, and a comment to the jury upon her absence by the district attorney, permitted by the court after objection, is *held* to be reversible error. *Ib.*

5. H. was indicted jointly with R. for the murder of C. Before the day of trial R. was killed, whereupon H. was tried separately. It was clearly proved at the trial that H. did not kill C. nor take any part in the physical struggle which resulted in his death at the hands of R. There was evidence tending to show that by his language and gestures H. abetted R., but this evidence was given by persons who stood at some distance from the scene of the crime. H. denied having used such language, or any language with an intent to participate in the murder, and insisted that what he had said had been said under the apprehension that R., who was in a dangerous mood, was about to shoot him (H.). The court instructed the jury that it was proved

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beyond controversy that R. fired the gun, and continued: "If the defendant was actually or constructively present at that time, and in any way aided or abetted by word or by advising or encouraging the shooting of C. by R., we have a condition which under the law puts him present at the place of the crime; and if the facts show that he either aided or abetted or advised or encouraged R., he is made a participant in the crime as thoroughly and completely as though he had with his own hand fired the shot which took the life of the man killed. The law further says that if he was actually present at that place at the time of the firing by R., and he was there for the purpose of either aiding, abetting, advising, or encouraging the shooting of C. by R., and that as a matter of fact he did not do it, but was present at the place for the purpose of aiding or abetting or advising or encouraging his shooting, but he did not do it because it was not necessary, it was done without his assistance, the law says there is a third condition where guilt is fastened to his act in that regard." *Held*, that this instruction was erroneons in two particulars: (1) It omitted to instruct the jury that the acts or words of encouragement and abetting must have been used by the accused with the intention of encouraging and abetting R.; (2) Because the evidence, so far as the court is permitted to notice it, as contained in the bills of exception, and set forth in the charge, shows no facts from which the jury could have properly found that the rencounter was the result of any previous conspiracy or arrangement. *Hicks* v. *United States*, 442.

See COURT AND JURY; JURISDICTION, D, 1, 2, 3; EVIDENCE, 1, 2, 3, 4, 5; WITNESS, 1, 2, 3.

CUSTOMS DUTIES.

1. Under the tariff act of 1883, a kind of sulphate of potash, the only common use of which, either by itself or in combination with other materials, is as manure or in the manufacture of manure, is within the clause of the free list which exempts from duty "all substances expressly used for manure"; and is not within the clause of "Schedule A. — Chemical Products," which imposes a duty on "potash, sulphate of, twenty per centum ad valorem." *Magone* v. *Heller*, 70.
2. In estimating the amount of duty to be imposed upon shell opera glasses under the tariff act of March 3, 1883, 22 Stat. 488, c. 121, the value of the materials should be taken at the time when they are put together to form the completed glass. *Seeberger* v. *Hardy*, 420.
3. The question whether the opera glasses should be regarded as falling within the description of paragraph 216, as a manufacture composed wholly or in part of metal is not raised by the record, and, no instruction based upon that interpretation having been asked of the court below, this court does not find it necessary to express an opinion on the subject. *Ib.*

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DAMAGES.

In an action at common law for a maritime tort, the admiralty rule of an equal division of damages in case of a collision between two vessels, when both are guilty of faults contributing to it, does not prevail; but the general rule there is, that if both vessels are culpable in respect of faults operating directly and immediately to produce the collision, neither can recover damages for injuries so caused. *Belden* v. *Chase*, 674.

DISTRICT ATTORNEY.

See NATIONAL BANK, 2.

EJECTMENT.

1. A defendant in ejectment who relies on adverse possession during the statutory period as a defence must show actual possession — not constructive — and an exclusive possession — not a possession in participation with the owner, or others. *Ward* v. *Cochran*, 597.
2. A judgment rendered on a special verdict failing to find all the essential facts is erroneous; and consequently a special verdict in an action of ejectment, which finds that the grantor of the defendant entered into possession of the land in controversy under a claim of ownership, and that he remained in the open, continued, notorious, and adverse possession thereof for the period of sixteen years, when he sold and transferred the same to the defendant, who remained in open, continuous, notorious, and adverse possession of the same under claim of ownership down to the present time, is defective in that it does not find that the adverse possession was actual and exclusive. *Ib.*

EQUITY.

1. Where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce it, or, in the absence of fraud, accident, or mistake to so modify it as to make it legal, and then enforce it. *Hedges* v. *Dixon County*, 182.
2. In 1870, M., a citizen of Indiana, filed a bill in equity in the Circuit Court of the United States for the District of Nebraska against R., a citizen of Nebraska, to establish his right to real estate near Omaha, to which R. set up title. Each claimed under a judicial sale against P. M. obtained a decree in 1872, establishing his title, and directing R. to convey to him, or, in default of that, authorizing the appointment of a master to make the conveyance. R. refused to make the conveyance, and it was made by a master to M. under the decree. The entire interest of R. came by mesne conveyances to W., a citizen of Nebraska. M. reëntered upon the premises, and set up the title which had been declared invalid in the decree of 1872. W. thereupon filed in the same court an ancillary bill, praying that R. be restrained from asserting his pretended title and from occupying the

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premises; that he might be decreed to have no interest in the lands; that a writ of possession issue, commanding the marshal summarily to remove R., his tenants and agents from the premises, and that R. be perpetually enjoined from setting up his claims. R. demurred on the ground of want of jurisdiction by reason of both parties being citizens of the same State. The demurrer was overruled, the defendant answered, and upon the pleadings and proofs a decree was entered for the plaintiff, in conformity with the prayer in the bill. *Held:* (1) That the bill was clearly a supplemental and ancillary bill, such as the court had jurisdiction to entertain, irrespective of the citizenship of the parties; (2) That the original decree not only undertook to remove the cloud on M.'s title, but it included and carried with it the right to possession of the premises, and that right passed to W. as privy in estate; (3) That certain facts set up as to an alleged transfer by M. of his interest to a citizen of Nebraska before filing his bill could not be availed of collaterally after such a lapse of time, and with no excuse for the delay; (4) That the property claimed could be fully identified; (5) That until R. should give notice that his holding was adverse to W., the latter was entitled to treat it as a holding in subordination to the title of the real owner under the decree of 1872. *Root* v. *Woolworth*, 401.

3. T. bought a tract of land in Kansas City of S. & W. under a contract on their part signed by K. as their agent, under which payments were to be made at stipulated times, notes bearing interest to be given for those sums, and a deed to be given on final payment. The agent's authority from W. was in writing; from S., it was verbal. W. died shortly after the contract was made, and before any payment matured. T. went into possession, gave the notes, made payable to K. or bearer, made payments to K. as they became due, without knowledge of the death of W., and improved the property by erecting buildings upon it. On making the last payment he was informed that W. had died. The interests of W. and S. became vested in L., who brought a suit in ejectment against the tenant of T. T. intervened in that suit and his equitable defence being overruled, filed a bill to restrain its further prosecution. *Held:* (1) That the death of W. revoked K.'s authority to act for him or his estate, and payments made to K. as his agent after his death did not discharge T.'s obligation to his estate; (2) That whether it also operated as a revocation of the verbal authority given by S., may admit of some doubt, but is unimportant in view of the long silence of S.; (3) That in view of the character of the notes, and in view of the fact that L. was not an innocent purchaser, but took title with full knowledge of the facts, including the open, notorious, and unequivocal possession of the property by T., the decree of the court below, granting a perpetual injunction on payment into court of one-half of the purchase money with interest, should be affirmed. *Long* v. *Thayer*, 520.

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4. A decree in chancery, which determines that a partnership existed between the parties, that one partner is entitled to recover of the other a share in the profits of the partnership business, that the defendant partner account to the plaintiff partner, and that the case be referred to a master to state such account upon proofs, is not a final decree. *Latta* v. *Kilbourn*, 524.

5. Passing by the question whether a receiver appointed by a court pending proceedings to foreclose a railroad mortgage is precluded from buying bonds on the market or from agreeing to unite with others in bidding at the sale, and the question whether the contract set up in this case is within the statute of frauds of the State of Minnesota, and the question whether, even if the contract was illegal and not enforceable in a court of equity, an account might not be compelled, the court holds that the plaintiff has failed in proving his case. *Farley* v. *Hill*, 572.

6. In chancery proceedings in the Federal courts, when a plea in bar meets and satisfies all the claims of the bill and it is sustained, it will, under Equity rule 33, avail the defendant so far as to require a final decree in his favor. *Horn* v. *Detroit Dry Dock Co.*, 610.

7. In this case the proofs taken fully and clearly establish the truth of the matters set up and alleged in the defendants' plea, including the complainant's receipt in full satisfaction of all claims. *Ib.*

See CORPORATION;
COTENANT;
JURISDICTION, A, 22; C, 3 to 6;
MUNICIPAL BOND;
PARTNERSHIP, 1;
RAILROAD, 2.

ESTOPPEL.

See COMMON CARRIER, 3;
CONTRACT, 2, (5);
NEGLIGENCE.

EVIDENCE.

1. When the tendency of testimony offered in a criminal case is to throw light upon a particular fact, or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge which a court of errors will not interfere with, unless it manifestly appears that the testimony has no legitimate bearing upon the question at issue, and is calculated to prejudice the accused in the minds of the jurors. *Moore* v. *United States*, 57.

2. When a necessity arises for a resort to circumstantial evidence in a criminal trial, objections on the ground of relevancy are not favored, as the effect of circumstantial facts depends upon their connection with each other, and considerable latitude is allowed on the question of motive. *Ib.*

3. The fact that such testimony also has a tendency to show that the

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defendant was guilty of the alleged offence is not sufficient reason for its exclusion, if otherwise competent. *Ib.*

4. Acting on these principles, the court sustains the ruling of the court below admitting testimony stated at length in the opinion, to show a motive for the alleged murder. *Ib.*
5. An exception to the denial of a motion for a new trial on the ground that the verdict was not supported by the evidence is untenable under repeated rulings of this court. *Ib.*
6. The ruling in *Logan* v. *United States*, 144 U. S. 263, that, "upon an indictment for conspiracy, acts or declarations of one conspirator, made after the conspiracy has ended, or not in furtherance of the conspiracy, are not admissible in evidence against the other conspirators," affirmed and followed. *Brown* v. *United States*, 93.
7. In an action at law against a bank to recover on a check drawn and issued by its cashier, if it be admitted that the check was obtained without consideration, and was invalid in the hands of the immediate payee, the plaintiff must prove either that he was a *bona fide* holder, or that the person from whom he received the paper had taken it for value without notice of defect in its inception. *Thompson* v. *Sioux Falls National Bank*, 231.

See BOUNDARY; CRIMINAL LAW, 4; INSURANCE; WITNESS, 1, 2.

EXCEPTION.

1. The verdict in this case was returned December 16, 1887, and judgment entered thereon on the same day. On the next day ten days were granted for filing a bill of exceptions, which time was extended from time to time, but the last extension expired before April 1, 1889, when they were settled and signed. *Held*, that the allowance of this bill of exceptions was not seasonable. *Morse* v. *Anderson*, 156.
2. The exception to the judge's charge does not embrace too large a portion of it, and is not subject to the often sustained objection, of not being sufficiently precise and pointed to call the attention of the judge to the particular error complained of. *Hicks* v. *United States*, 442.
3. It is well settled that, instead of preparing separate bills for each separate matter, all the alleged errors of a trial may be incorporated into one bill of exceptions; and the exception in this case is specific and direct to the one error of compelling the defendant to become a witness against himself, and comes within this rule. *Lees* v. *United States*, 476.
4. An express order of court during the judgment term, continuing a cause for the purpose of settling, allowing, signing, and filing a bill of exceptions, and the settlement and allowance and filing of the bill during the term to which the continuance was made, takes the exceptions out of the operation of the general rule, that the power to reduce exceptions to form and have them signed and filed is, under ordinary

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circumstances, confined to the term at which the judgment is rendered. *Ward* v. *Cochran*, 597.

5. A bill of exceptions which, in so far as it relates to the charge, specifies with distinctness the parts excepted to, and the legal proposition to which exceptions are taken, is sufficient. *Ib.*

See EVIDENCE, 5;
JURISDICTION, A, 3.

EXECUTION.

See ABATEMENT.

EXECUTIVE.

See COURT-MARTIAL.

FEES.

1. A marshal of the United States is not entitled to commissions on disbursements for the support of a penitentiary, made under Rev. Stat. § 1892. *United States* v. *Baird*, 54.
2. A commissioner of a Circuit Court of the United States is not entitled, under Rev. Stat. § 847, to compensation for hearing charges made by complaining witnesses against persons charged with violations of the laws of the United States, and holding examinations of such complaining witnesses and any other witnesses produced by them in support of their allegation, and deciding whether a warrant should not issue upon the complaint made. *United States* v. *Patterson*, 65.
3. Although such services are of a judicial nature, and may be required by the laws of the State in which they are rendered, they cannot be charged against the United States in the absence of a provision by Congress for their payment. *Ib.*

FRAUD.

See BANK.

FRAUDULENT REPRESENTATIONS.

1. A person who makes representations of material facts, assuming or intending to convey the impression that he has actual knowledge of the existence of such facts, when he is conscious that he has no such knowledge, is as much responsible for the injurious consequences of such representations to one who believes and acts upon them, as if he had actual knowledge of their falsity. *Lehigh Zinc & Iron Company* v. *Bamford*, 665.
2. Deceit may be predicated of a vendor or lessor who makes material, untrue representations in respect to his own business or property, for the purpose of their being acted upon, and which are in fact relied upon by the purchaser or lessee, the truth of which representations the vendor or lessor is bound, and must be presumed, to know. *Ib.*

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3. General assertions by a vendor or lessor, that the property offered for sale or to be leased is valuable or very valuable, although such assertions turn out to be untrue, are not misrepresentations, amounting to deceit, nor are they to be regarded as statements of existing facts, upon which an action for deceit may be based, but rather as the expressions of opinions or beliefs. *Ib.*

4. Fraud upon the part of a vendor or lessor, by means of representations of existing material facts, is not established, unless it appears such representations were made for the purpose of influencing the purchaser or lessee, and with knowledge that they were untrue; but where the representations are material and are made by the vendor or lessor for the purpose of their being acted upon, and they relate to matters which he is bound to know, or is presumed to know, his actual knowledge of their being untrue is not essential. *Ib.*

HABEAS CORPUS.

1. A writ of *habeas corpus* cannot be used to perform the office of a writ of error or appeal. *In re Swan, Petitioner*, 637.

2. When a person is imprisoned under a judgment of a Circuit Court which had no jurisdiction of the person or of the subject-matter, or authority to render the judgment, and no writ of error or appeal will lie, then relief may be accorded by writ of *habeas corpus*. *Ib.*

See JURISDICTION, A, 16.

HIGH SEAS.

See JURISDICTION, D, 1, 3.

INDIAN AGENT.

See SALARY, 3.

INSURANCE.

A policy of life insurance, payable in "thirty days after due notice and satisfactory evidence of death" and excepting this risk: "Suicide.—The self-destruction of the insured, in any form, except upon proof that the same is the direct result of disease or of accident occurring without the voluntary act of the insured," covers the case of the insured's death as the direct result of taking poison when his mind is so far deranged as to be unable to understand the moral character of his act, even if he does understand its physical consequences; and it is sufficient to prove this at the trial, without stating it in the preliminary proof of death. *Connecticut Mutual Life Insurance Co.* v. *Akens*, 468.

See COMMON CARRIER, 1, 2, 3.

JUDGMENT.

See EQUITY, 4, 6.

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JURISDICTION.

A. Jurisdiction of the Supreme Court.

1. The question whether an action to foreclose a lien for unpaid assessments for street improvements in San Francisco is *in rem* or *in personam*, is one upon which the decision of the Supreme Court of California is binding, and its ruling that a plaintiff who was no party to defendants' suits to foreclose, has a right to show by evidence *aliunde* the invalidity of the judgments obtained by them, is not a subject for review here. *Wood* v. *Brady*, 18.
2. In order to maintain a writ of error against a judgment of the highest court of a State, it must appear that the judgment involved a decision against a right, title, privilege, or immunity claimed by the plaintiff in error under the Constitution or laws of the United States, which was specially set up or claimed in the state court at the proper time and in the proper way; and, as the record in this case does not show such facts, the writ of error is dismissed without intimating any opinion upon the questions sought to be raised here. *Schuyler National Bank* v. *Bollong*, 85.
3. A general exception to a charge, which does not direct the attention of the court to the particular portions of it to which objection is made, raises no question for review. *Holder* v. *United States*, 91.
4. The denial of a motion for a new trial cannot be assigned for error. *Ib.*
5. In this case the writ of error was dismissed because the judgment below rested upon a construction by the state court of a statute of the State, which was sufficiently broad to sustain the judgment. *Miller* v. *Swann*, 132.
6. This court exercises appellate jurisdiction only in accordance with the acts of Congress on that subject. *Colorado Central Mining Co.* v. *Turck*, 138.
7. In order to bring an appeal from the judgment of a Circuit Court taken since the Judiciary Act of March 3, 1891, 26 Stat. 826, c. 517, went into effect, within the first of the six classes of cases specified in section 5 of that act, viz., "in any case in which the jurisdiction of the court is in issue," the jurisdiction of the Circuit Court below must have been in issue in the case, and must have been decided against the appellants, and the question of jurisdiction must have been certified; but the court does not now say that the absence of a formal certificate would necessarily be fatal. *Carey* v. *Houston & Texas Central Railway Co.*, 170.
8. The fifth section of that act does not authorize a direct appeal to this court in a suit upon a question involving the jurisdiction of the Circuit Court over another suit previously determined in the same court. *Ib.*
9. A bill in equity to impeach and set aside a decree of foreclosure of a railroad mortgage, on the ground of fraud, and to prevent the consum-

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mation of a scheme for reorganization, is a separate and distinct case from the foreclosure suit, and no question of jurisdiction over that suit, or over the rendition of the decree passed therein, can be availed of to sustain an appeal to this court from a decree of a Circuit Court under the provisions of the first class of the six cases specified in section 5 of the act of March 3, 1891. *Ib.*

10. In order to hold an appeal from a judgment or decree of a Circuit Court to this court to be maintainable under the fourth class of said section 5, viz., "any case that involves the construction or application of the Constitution of the United States," the construction or application of the Constitution must be involved as controlling, although on the appeal all other questions might be open to determination. *Ib.*
11. The jurisdiction of this court in this case is limited by the act of February 25, 1889, 25 Stat. 693, c. 236, to the determination of the questions as to the jurisdiction of the Circuit Court. *Mississippi Mills* v. *Cohn*, 202.
12. The decision by the Supreme Judicial Court of Massachusetts that a creditor of an insolvent debtor, who proves his debt in insolvency, and accepts the benefit of proceedings under the state statute of May 13, 1884, entitled "An act to provide for composition with creditors in insolvency," Mass. Stats. 1884, c. 236, and the act amending the same, thereby waives any right which he might otherwise have had to object to the validity of the composition statutes, as impairing the obligation of contracts, presents no Federal question for review by this court. *Eustis* v. *Bolles*, 361.
13. To give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment, as rendered, could not have been given without deciding it. *Ib.*
14. Where the record discloses that, if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment. *Ib.*
15. When this court, in a case brought here by writ of error to a state court, finds it unnecessary to decide any Federal question, its logical course is to dismiss the writ of error. *Ib.*
16. The Toledo and Ann Arbor Railway Company, which connected with the Michigan Southern Railway in the carrying on of interstate commerce, filed a bill in the Circuit Court to restrain the Michigan Southern from refusing to receive its cars used in such commerce,

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and discriminating against it, on the ground that it employed engineers who were not members of the Brotherhood of Locomotive Engineers. An injunction was issued, and a few days later the Lake Shore applied for an order of attachment against some of its employés who had refused to haul cars and perform service for them, thus hindering them from complying with the order of the court in respect to the Toledo and Ann Arbor Company. A rule to show cause was issued, and such proceedings had thereunder that one of the employés was adjudged guilty of contempt, was fined, and was ordered to be committed until payment of the fine. This employé applied to the Circuit Court for a writ of *habeas corpus*. The petition, after setting the facts forth, claimed that the Circuit Court had no jurisdiction of the cause in which the original order of injunction had been issued, for reasons stated, and further, that it had no jurisdiction of the petitioner's person, because he was no party to that suit, and had not been served with process. The application was denied and the petition dismissed, from which judgment the petitioner appealed to this court. *Held*, (1) That while the general right of appeal from the judgments of Circuit Courts on *habeas corpus* directly to this court is taken away by the act of March 3, 1891, 26 Stat. 826, c. 517, nevertheless, that right still exists in the cases designated in section 5 of that act; (2) That the jurisdiction of the Circuit Court over the petition for *habeas corpus* was not in issue, and was not decided adversely to the petitioner, and this appeal therefore did not come within the first of the classes named in section 5 of the act of 1891; (3) That the construction or application of the Constitution was not involved, in the sense of the statute, and that the petition did not proceed on that theory, but on the ground of want of jurisdiction in the prior case over the subject-matter, and in this case over the person of the petitioner; (4) That the appeal must be dismissed. *In re Lennon*, 393.

17. Findings of fact in an action brought to recover duties on importations paid under protest, which do not show what the collector charged the plaintiff, nor sufficiently describe the articles imported, and a record which fails to show under what provisions of the tariff act the parties claimed respectively, leave this court unable to direct judgment for either party. In such case the opinion of the court below cannot be resorted to to help the findings out. *Saltonstall* v. *Birtwell*, 417.
18. This court must determine for itself whether it has jurisdiction under Rev. Stat. § 709, to review the judgment of a state court; and the certificate of the presiding judge of the State that a state of case exists for the interposition of this court cannot, of itself, confer jurisdiction upon it to reëxamine a judgment of that court. *Powell* v. *Brunswick County*, 433.
19. It is essential to the maintenance of the jurisdiction over the judgment of the state court, upon the ground of erroneous decision as to

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the validity of a state statute or a right under the Constitution of the United States, that it should appear from the record that the validity of such statute was drawn in question, as repugnant to the Constitution, and that the decision sustained its validity, or that the right was specially set up or claimed, and denied. *Ib.*

20. It is well settled that the construction put upon a state statute by the highest court of the State will generally be followed by this court, unless it conflicts with the Constitution or a Federal statute, or a general rule of commercial law. *Ib.*

21. Applying these rules, it was *held* that the construction put by the Supreme Court of Appeals of the State of Virginia in *Taylor* v. *Supervisors*, 86 Virginia, 506, upon the provision in the charter of the Atlantic and Danville Railway Company considered in this suit, leaves no Federal question for this court. *Ib.*

22. When, in a suit in equity for the infringement of letters patent, the court below makes an interlocutory decree in plaintiff's favor, and then entertains a motion for a rehearing and receives affidavits in support of it, and denies the motion, this court does not feel itself at liberty to consider those affidavits. *Giles* v. *Heysinger*, 627.

23. The court follows *Hammond* v. *Johnston*, 142 U. S. 73, on a substantially similar state of facts, and holds that the ruling of the state court was broad enough to maintain the judgment, without considering the Federal question. *Hammond* v. *Connecticut Mutual Life Insurance Co.*, 633.

24. The appellate jurisdiction of this court over questions national and international in their nature, arising in an action for a maritime tort committed upon navigable waters and within admiralty jurisdiction, cannot be restrained by the mere fact that the party plaintiff has elected to pursue his common law remedy in a state court. *Belden* v. *Chase*, 674.

See ADMIRALTY, 1; APPEAL, 3; EQUITY, 4; JURISDICTION, B; MANDAMUS, 2.

B. JURISDICTION OF CIRCUIT COURTS OF APPEAL.

When the jurisdiction of a Circuit Court is invoked solely on the ground of diverse citizenship, the judgment of the Circuit Court of Appeals is final, although another ground for jurisdiction in the Circuit Court may be developed in the course of subsequent proceedings in the case. *Colorado Central Mining Co.* v. *Turck*, 138.

C. JURISDICTION OF CIRCUIT COURTS.

1. When the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at

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the outset, from the pleadings, that the suit is one of that character, of which the Circuit Court could properly take cognizance at the time its jurisdiction is invoked. *Colorado Central Mining Co.* v. *Turck*, 138.

2. A bill in equity in the Circuit Court of the United States in Tennessee, by a corporation organized under the laws of the State of Kentucky, against another company described as a corporation organized under the laws of that State and having its principal office in the district in which the suit was brought, and against five individuals, citizens of a county within that district, prayed "that the parties named as defendants be made such," and for a reconveyance and an account of property of the plaintiff, alleged to have been fraudulently caused by the individual defendants to be conveyed to the defendant corporation, and to have been wasted and injured by all the defendants. The individual defendants demurred for want of jurisdiction. The plaintiff thereupon, by leave of court, filed an amended bill, which "refers to the original bill and its prayer, and makes the same a part hereof, as if set out herein *in hæc verba;*" and further alleged that the individual defendants, in pursuance of their fraudulent scheme, pretended to procure from the State of Kentucky a charter under the name of the company "which is the same corporation mentioned in the original bill," and caused the plaintiff's property to be conveyed "to said pretended corporation," but this company was never lawfully organized, and the individual defendants controlled it and were doing business as a partnership under its name; and prayed that the parties defendants to the original bill be made defendants to this amended bill, and that the individual defendants be made defendants as partners under the name of the company, and be made to account personally and individually. *Held*, that this company, as a corporation of Kentucky, was a party defendant to the amended bill of the plaintiff, likewise a Kentucky corporation; and that the amended bill must therefore be dismissed for want of jurisdiction. *Empire Transportation Co.* v. *Empire Mining Co.*, 159.

3. The jurisdiction of Federal courts, sitting as courts of equity, cannot be enlarged or diminished by state legislation. *Mississippi Mills* v. *Cohn*, 202.

4. Whether such a court has jurisdiction in equity over a particular case, will be determined by inquiring whether by the principles of common law and equity, as distinguished and defined in this country and in the mother country at the time of the adoption of the Constitution of the United States, the relief sought in the bill was one obtainable in a court of law, or one which only a court of equity was fully competent to give. *Ib.*

5. A creditors' bill, to subject property of the debtor fraudulently standing in the name of a third party to the payment of judgments against the debtor, is within the jurisdiction of a Federal court, sitting as a court of equity, although, in the courts of the State in which the Federal

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court sits, state legislation may have given the creditor a remedy at law. *Ib.*

6. N. and S., being citizens of Louisiana, obtained a judgment in a court of the State against C., also a citizen of Louisiana, which they assigned to W. and L., citizens of Missouri. The assignees thereupon brought suit against C. in the Circuit Court of the United States for the Western District of Louisiana, putting the jurisdiction on the ground of diverse citizenship. *Held*, that under the provisions of § 1 of the act of March 3, 1875, 18 Stat. 470, c. 137, which statute was in force when the suit was commenced, it could not be maintained. *Ib.*
7. In the act of March 3, 1887, c. 373, § 1, as corrected by the act of August 13, 1888, c. 866, giving the Circuit Courts of the United States original jurisdiction, "concurrent with the courts of the several States," of all suits of a civil nature, in which the matter in dispute exceeds $2000 in amount or value, "arising under the Constitution or laws of the United States" or in which there is "a controversy between citizens of a State and foreign States, citizens or subjects," the provision that "no civil suit shall be brought against any person by any original process or proceeding in any other district than that whereof he is an inhabitant," is inapplicable to an alien or a foreign corporation sued here, and especially in a suit for the infringement of a patent right; and such a person or corporation may be sued by a citizen of a State of the Union in any district in which valid service can be made upon the defendant. *In re Hohorst*, 653.

See CONTEMPT, (2); EQUITY, 2, (1); CORPORATION, 1; MUNICIPAL BOND.

D. JURISDICTION OF DISTRICT COURTS OF THE UNITED STATES.

1. The term "high seas," as used in the provision in Rev. Stat. § 5346, that "every person who, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, on board any vessel belonging in whole or part to the United States, or any citizen thereof, with a dangerous weapon, or with intent to perpetrate any felony, commits an assault upon another shall be punished," etc., is applicable to the open, unenclosed waters of the Great Lakes, between which the Detroit River is a connecting stream. *United States* v. *Rodgers*, 249.
2. The courts of the United States have jurisdiction, under that section of the Revised Statutes, to try a person for an assault with a dangerous weapon, committed on a vessel belonging to a citizen of the United States, when such vessel is in the Detroit River, out of the jurisdiction of any particular State, and within the territorial limits of the Dominion of Canada. *Ib.*
3. The limitation of jurisdiction by the qualification that the offences punishable are committed on vessels in any arm of the sea, or in any

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river, haven, creek, basin, or bay "without the jurisdiction of any particular State," which means without the jurisdiction of any State of the Union, does not apply to vessels on the "high seas" of the lakes, but only to vessels on the waters designated as connecting with them; and so far as vessels on those seas are concerned, there is no limitation named to the authority of the United States. *Ib.*

4. A District Court of the United States has jurisdiction over an action to recover a penalty imposed for a violation of the act of February 26, 1885, 23 Stat. 332, c. 164, "to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia." *Lees* v. *United States*, 476.

5. As a District Court of the United States has jurisdiction under Rev. Stat. § 563, of all suits to recover forfeitures incurred under any law of the United States, including forfeitures of a bail bond, the question whether the forfeiture should be enforced by *scire facias* under Rev. Stat. § 716, or by proceedings under a law of the State in which the court is held, goes only to the remedy and not to the jurisdiction, and the action of the District Court is binding in a collateral proceeding. *Insley* v. *United States*, 512.

E. JURISDICTION OF THE COURT OF CLAIMS.

The Court of Claims was not estopped by the recitals in the act of January 17, 1887, 24 Stat. 358, c. 21, referring this case to it, from considering the question of the title of the claimants to the property whose value is sought to be recovered. *Kinkead* v. *United States*, 483.

LACHES.

See MANDAMUS, 3;
PATENT FOR INVENTION, 12, (3);
SALARY, 2.

LEASE.

See CONTRACT, 4;
RAILROAD, 2.

LIEN.

See CORPORATION, 2, 3, 4, 5, 6.

MARSHAL.

See FEES, 1.

MANDAMUS.

1. This court cannot, by writ of mandamus, compel a court below to decide a matter before it in a particular way. *In re Parsons*, 150.

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2. This court cannot, through the instrumentality of a writ of mandamus, review the judicial action of a court below, had in the exercise of its legitimate jurisdiction. *Ib.*

3. If a suit brought in the Circuit Court of the United States against a foreign corporation and against individuals is erroneously dismissed as against the corporation for want of jurisdiction thereof, mandamus lies to compel that court to take jurisdiction of the suit as against the corporation. And when an appeal, taken by the plaintiff to this court within six weeks from the order of dismissal, remains upon the docket, without any motion by the appellee to dismiss it, until the case is reached for argument, and is then dismissed by the court for want of jurisdiction, and the plaintiff, within five weeks afterwards, applies for a writ of mandamus, there is no such laches as should deprive him of this remedy. *In re Hohorst*, 653.

MINERAL LAND.

In a suit in equity to have T. declared a trustee, for the use of S., of an interest in a mine, and to compel a conveyance of the same to S., T. set up two sources of independent title in himself: (1) the purchase of a portion of the interest at an execution sale under a judgment in a suit in which process was not served upon S., no appearance entered for him, no judgment entered against him, and in which he was never in court; (2) proceedings under Rev. Stat. § 2324 by T. against S. as an alleged "coöwner" of the mine to compel him to contribute to the payment of the annual labor on the mine for the year 1884, by which proceeding it was claimed that the interest of S. in the mine became forfeited to T. At the time when the labor was done for which contribution was demanded, S. had not received the deed for his interest, and the sheriff's deed to T. of the interest which he claimed was not delivered until March, 1885. *Held*, (1) That T. acquired no interest in the share of S. in the mine by the sheriff's deed; (2) That T. was not a coöwner in the mine with S. during the year 1884, within the meaning of the statute, which, as it provides for the forfeiture of the rights of a coöwner, should be construed strictly. *Turner* v. *Sawyer*, 578.

MORMON CHURCH.

Congress having, by joint resolution approved October 25, 1893, declared the uses to which the property of the Mormon Church should be devoted, the court remands this case for further proceedings in the Supreme Court of the Territory in conformity with the provisions of that resolution. *United States* v. *Mormon Church*, 145.

MUNICIPAL BOND.

Holders of municipal bonds, issued by a county in excess of its authority, cannot, by an offer to surrender and cancel so much of such bonds as

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may, upon inquiry, be found to exceed the limit authorized by law, invest a court of equity with jurisdiction to ascertain the amount of such excess, and to declare the residue of such bonds valid and enforce the payment thereof against the county. *Hedges* v. *Dixon County*, 182.

MURDER.

See CRIMINAL LAW.

NATIONAL BANK.

1. The receiver of a national bank is an officer and agent of the United States within the meaning of those terms as used in Rev. Stat. § 380, providing that all suits and proceedings arising out of the provisions of law governing national banking associations, in which the United States or any of its officers or agents are parties, shall be conducted by the District Attorneys of the several districts, under the direction and supervision of the Solicitor of the Treasury. *Gibson* v. *Peters*, 342.
2. If a District Attorney of the United States, acting under the provisions in Rev. Stat. § 380, conducts a suit or proceeding arising out of the provisions of law governing national banking associations, he is entitled to no remuneration other than that coming from his salary, from the compensation and fees authorized to be taxed and allowed, and such additional compensation as is expressly allowed by law, specifically, on account of services named. *Ib.*

NEGLIGENCE.

1. Though questions of negligence and contributory negligence are, ordinarily, questions of fact to be passed upon by a jury, yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury, and direct a verdict. *Elliott* v. *Chicago, Milwaukee & St. Paul Railway*, 245.
2. Plaintiff sued defendant in a Circuit Court of the State of Michigan on the cause of action for which this suit is brought. Verdict and judgment were in plaintiff's favor in the trial court. This judgment was reversed by the Supreme Court of the State, and a new trial was ordered. When the case was remanded plaintiff voluntarily withdrew his action and submitted to a nonsuit which was not to prevent his right to bring any suit in any court. He then commenced this action in the Circuit Court of the United States. The defendant contended (1) that plaintiff was estopped from bringing this action by the judgment in the state court; (2) that the record showed no negligence on the part of the defendant, and that a verdict should have been directed in its favor. The Circuit Court overruled the first contention of the defendant, but accepted the second, and directed a verdict for defend-

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ant. *Held*, (1) That the plaintiff was not estopped from bringing this action by the proceedings and judgment in the state court; (2) That the evidence in regard to negligence was conflicting, and the question should have been left to the jury under proper instructions. *Gardner* v. *Michigan Central Railroad Co.*, 349.

3. The question of negligence in such case is one of law for the court only when the facts are such that all reasonable men must draw the same conclusion from them; or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish. *Ib.*

NEW TRIAL.

1. An application for a rehearing cannot be entertained when presented after the expiration of the term at which the judgment was rendered. *Bushnell* v. *Crooke Mining Co.*, 82.
2. Ordinarily a court has no power to grant a new trial at a term subsequent to that at which the original judgment was rendered. *Belknap* v. *United States*, 588.
3. The Court of Claims, however, under Rev. Stat. § 1088, has power to grant a new trial in such case on a motion on behalf of the United States, and a mandate from this court does not affect that power. *Ib.*
4. When such a motion is made on behalf of the government on the ground that its officers understood that there was an agreement that a case which had been appealed to this court by the United States, and had been remanded to that court by this court, on the ground that the appellants had not entered it here, was to abide the result in another case appealed from the Court of Claims by the United States and decided here in their favor, the granting of the motion by the Court of Claims must be taken by this court as conclusive on the question whether there was sufficient evidence to establish the facts stated as the ground of the motion, when that evidence is not preserved. *Ib.*

See APPEAL, 2;
JURISDICTION, A, 4, 22.

OKLAHOMA.

See PUBLIC LAND, 4, 5.

PARTNERSHIP.

1. The plaintiff set up in his bill a verbal contract of partnership between the defendant and himself in the buying and selling of real estate, and called for an answer under oath. The defendant answered under oath, denying positively and in direct terms the existence of the alleged contract of partnership. *Held*, that, under well settled rules of equity pleading and practice, this answer could be overcome only by the tes-

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timony of at least two witnesses, or of one witness with corroborating circumstances, and that the proofs in this case fail to break down the defendant's denial. *Latta* v. *Kilbourn*, 524.

2. The violation by one partner of his undertaking to give to the firm or his associate an opportunity or option to engage in any particular transaction, not within the scope of the firm's business, does not entitle his copartners to convert him into a constructive trustee in respect to the profits realized therefrom. *Ib.*
3. An agreement by partners that no one of them should engage in the buying and selling of real estate on his own account does not entitle the other partners to share in profits made by one of them in real estate speculations, entered into by him without first securing the assent of his copartners. *Ib.*
4. If a member of a partnership uses information obtained by him in the course of the transaction of the partnership business, or by reason of his connection with the firm, for purposes wholly without the scope of the partnership business, and not competing with it, the firm is not entitled to an account of any benefit derived therefrom. *Ib.*

See EQUITY, 4.

PATENT FOR INVENTION.

1. The first claim under the reissued letters patent No. 10,361, issued to Henry L. Spiegel, July 31, 1883, for improvements in cabinet locks, is void because it broadens and expands the claims in the original patent, and it does not appear that there was any accident, inadvertence, or mistake in the specification and claim of the original, or that it was void or inoperative for any reason which would entitle the patentee to have a reissue. *Corbin Cabinet Lock Co.* v. *Eagle Lock Co.*, 38.
2. When an applicant for letters patent makes a broad claim which is rejected, and he acquiesces in the decision and substitutes a narrower claim therefor, he cannot insist upon a construction of the narrowed claim which would cover what was so rejected. *Ib.*
3. To warrant new and broader claims in a reissue, they must not only be suggested or indicated in the original specification, drawings, or models, but it must appear that they constitute part of the invention intended to be covered by the original patent. *Ib.*
4. In applications for reissue the patentee cannot incorporate claims covering what had been rejected on the original application. *Ib.*
5. Letters patent No. 316,411, granted April 21, 1885, to Henry L. Spiegel for improvements in cabinet locks, are void for want of patentable invention. *Ib.*
6. The first claim in letters patent No. 77,878, granted May 11, 1868, to James F. Gordon, was a claim "for a binding arm capable of adjustment in the direction of the length of the grain, in combination with an automatic twisting device, substantially as and for the purposes described;" and it was not infringed by the devices used by the

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defendants for attaining the common purpose of securing the stalks of grain into bundles by passing around them a band at the middle of the stalks. *Gordon* v. *Warder*, 47.

7. The fourth and seventh claims in letters patent No. 325,688, issued to Albert G. Mead, September 8, 1885, for a "button" are not infringed by glove fasteners manufactured under letters patent Nos. 359,614 and 359,615, issued to Edwin J. Kraetzer, March 22, 1887; and though it would be possible to make out a literal infringement of the sixth claim, by construing the claim broadly, the court holds that the patentee is not entitled to such construction. *Ball & Socket Fastener Co.* v. *Kraetzer*, 111.
8. There is no equity in charging infringement upon a defendant in a patent suit, in consequence of an apparently accidental adoption of an immaterial feature of the plaintiff's patent. *Ib.*
9. The alleged invention patented in letters patent No. 123,142, issued January 30, 1872, to Philo D. Beckwith for "an improvement in stoves," was anticipated by prior patents and is void for want of invention in not describing how wide the flange should be in order to accomplish the desired result. *Howard* v. *Detroit Stove Works*, 164.
10. Letters patent No. 135,621, issued February 11, 1873, to Philo D. Beckwith for "novel improvements in a stove," are void because the bolting or riveting together of sections of a stove was well known at the time of the alleged invention, and the use of lugs with holes perforated through them was anticipated in other stoves and furnaces manufactured many years prior to the date of the patent. *Ib.*
11. Letters patent No. 206,074, issued to Philo D. Beckwith, July 16, 1878, for a "new and useful improvement in stove grates," is void because the claims in it were clearly anticipated, and because it involved no invention to cast in one piece an article which had formerly been cast in two pieces and put together, nor to make the shape of the grate correspond with that of the fire-pot. *Ib.*
12. In 1871 L. & B., being partners, commenced the manufacture of hydraulic elevators in Cincinnati. S. was employed by them as engineer and draughtsman at a fixed salary of $1200 per annum. While in their employ, and while using their tools and patterns, he invented a stop-valve in 1872, which was patented in February, 1876. In 1876 the partnership was dissolved, and a corporation was formed, called the L. & B. Company, in which the same business was instantly vested in the same interests, and remained there. Meanwhile S. ceased in 1874 to serve L. & B. as engineer and draughtsman, and went into their employ as consulting engineer, at a salary of $2000 per annum. The duties of the latter office did not require him to reside in Cincinnati. He served the partnership in this capacity up to its dissolution, and from that time served the corporation in the same capacity up to 1884. The partnership with his knowledge used his valve in the elevators constructed by them until its dissolution,

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and after that the corporation used it in the same way and with the like knowledge. In 1884 S. severed his connection with the corporation. During all this time he made no claim for remuneration for the use of his patent, and when asked why he had not, replied that he did not desire to disturb his friendly relations with the L. & B. Company. In 1884 he filed this bill in equity, with the usual prayers for an accounting and for an injunction. *Held*, (1) That, on authority of *McClurg* v. *Kingsland*, 1 How. 202, it might be presumed that S. had licensed L. & B. and the L. & B. Company to use his invention; (2) That, on the authority of *Solomons* v. *United States*, 137 U. S. 342, it might be presumed that S. had recognized an obligation, flowing from his employment by the partnership and by the corporation, to permit them to use his invention; (3) That he was guilty of laches in allowing so long a period to elapse before asserting his rights; (4) That the excuse he gave for not asserting them was entitled to a less favorable consideration by a court of equity than if his conduct had been that of mere inaction. *Lane & Bodley Co.* v *Locke*, 193.

13. The second claim in letters patent No. 233,240, for improvements in dress forms, issued October 12, 1880, to John Hall, and by him assigned to Charles A. Morss, viz.: "2. In combination with the standard *a* and ribs *c*, the double braces e^2, the sliding blocks f^1 and f^2, and rests h^1 and h^2, substantially as and for the purposes set forth," when read and interpreted with reference to other and broader claims which were made by the patentee and were rejected by the Patent Office, must either be held to be invalid for want of invention, or must be so limited in view of that action by the Patent Office, and in view of the prior state of the art, as not to be infringed by a combination leaving out one of the elements of the patentee's device. *Knapp* v. *Morss*, 221.
14. A claim in letters patent cannot be so construed as to cover what was rejected by the Patent Office on the application for the patent. *Ib.*
15. The combination of old elements which perform no new function, and accomplish no new results, does not involve patentable novelty. *Ib.*
16. The end or purpose sought to be accomplished by a device is not the subject of a patent, but only the new and useful means for obtaining that end. *Ib.*
17. Letters patent 248,646, granted to Charles Gordon, October 25, 1881, for "an improved apparatus for cooling and drawing beer" are void for want of patentable novelty, and the invention patented was anticipated. *Magin* v. *Karle*, 387.
18. The first claim in letters patent No. 218,300, issued August 5, 1879, to William Mills and Christian H. Hershey, for an improvement in hair-crimpers, viz.: "A hair-crimper consisting of a non-elastic metal core C, and braided covering A, said covering A being cemented to said core C throughout its entire length, substantially as described," is void for want of novelty. *Giles* v. *Heysinger*, 627.

See CONTRACT, 3.

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PLEADING.

1. While it is true that a receipt is open to explanation by parol proof to show what its real consideration was, the issue to that effect must be raised by the pleadings, and must have been taken in the court below, to be available here. *Horn* v. *Detroit Dry Dock Co.*, 610.
2. An accord and satisfaction cannot be set aside for mutual mistakes in regard to material facts, if the alleged mistakes have not been set up by proper pleadings. *Ib.*

PRACTICE.

1. Oral argument is not allowed on motions to dismiss appeals or writs of error. *Carey* v. *Houston & Texas Central Railway Co.*, 170.
2. On motion to dismiss or affirm it is only necessary to print so much of the record as will enable the court to act understandingly without referring to the transcript. *Ib.*

See EXCEPTION, 1; NEW TRIAL; JURISDICTION, A, 17, 22; WITNESS, 1.

PRINCIPAL AND AGENT.

See CONTRACT, 1.

PROMISSORY NOTE.

See EVIDENCE, 7.

PUBLIC LAND.

1. After the expiration of the time limited by the act of June 8, 1872, 17 Stat. 339, c. 354, for the completion of its road to Santa Fé, if not before that time, the Denver and Rio Grande Railway Company was entitled to claim the benefit of the act of March 3, 1875, 18 Stat. 482, c. 151, upon complying with its conditions. *United States* v. *Denver & Rio Grande Railway*, 1.
2. The act of March 3, 1875, 18 Stat. 482, c. 151, granting a right of way to railroads through the public lands, and authorizing them to take therefrom timber or other materials necessary for the construction of their roadways, station buildings, depots, machine-shops, sidetracks, turnouts, water stations, etc., permits a railway company to use the timber or material so taken on portions of its line remote from the place from which it is taken. *Ib.*
3. It is not decided that the act of March 3, 1875, gave a right to take timber from the public domain for making rolling stock; nor what structure, if any, not enumerated in that act would constitute necessary, essential, or constituent parts of a railroad. *Ib.*
4. Under the authority conferred upon the Secretary of the Treasury by the act of May 14, 1890, 26 Stat. 109, c. 207, entitled "An act to provide for town site entries of lands in what is known as 'Oklahoma,'

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and for other purposes," it was entirely competent for the Secretary to provide for an appeal to the Commissioner of the General Land Office in case of contest. *McDaid* v. *Oklahoma Territory*, 209.

5. When an appeal from a decision of the trustees appointed by the Secretary under the provisions of that act was duly taken, it became the duty of the trustees to decline to issue a deed to the appellee until the appeal was disposed of. *Ib.*

6. The general rule laid down in *Garland* v. *Wynn*, 20 How. 6, following in principle *Comegys* v. *Vasse*, 1 Pet. 193, 212, and maintained in *Monroe Cattle Co.* v. *Becker*, 147 U. S. 47, 57, that where several parties set up conflicting claims to property, with which a special tribunal may deal, as between one party and the government, regardless of the rights of others, the latter may come into the ordinary courts of justice, and litigate their conflicting claims, is announced to be the settled doctrine of this court. *Turner* v. *Sawyer*, 578.

See STATUTE, A, 1, 2.

RAILROAD.

1. In its ordinary acceptation and enlarged sense, the term "railroad" includes all structures which are necessary and essential to its operation. *United States* v. *Denver & Rio Grande Railway Co.*, 1.

2. On the 10th of February, 1879, the Council Bluffs and St. Louis Railway Company leased their projected railway from Council Bluffs to the state line to the St. Louis, Kansas City and Northern Railway Company for the term of 91 years. Together the lines formed the Omaha Division of the Wabash system. On the 15th of February, 1879, the lessee issued bonds to the amount of $2,350,000, secured by a mortgage to the United States Trust Company, to complete and equip the division. In November, 1879, the lessee was consolidated with the Wabash Railway Company, under the name of the Wabash, St. Louis and Pacific Railway Company. The new corporation assumed all the obligations of the old ones, entered into possession of all the property, issued bonds to the amount of $17,000,000, secured by a general mortgage to the Central Trust Company, and other bonds, and continued to operate the property down to May, 1884, when it filed a bill alleging its own insolvency, and asking the court to appoint receivers of all its property, which was done. A preferential indebtedness was recognized by the court to the extent of $4,378,233.49, which the receivers were directed to pay. The rentals and interest amounted to $2,175,062, of which $82,250 was for the rent of the Omaha Division. These also were ordered to be paid by the receivers. It turned out, practically, that so far from being able to make all these payments out of earnings, they were never enough to pay the preferential debts, and that the Omaha Division was operated at an actual loss, without taking the rental into account.

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These facts were made known to the court by the receivers in March, 1885, whereupon it ordered, in April, 1885, that the subdivisional accounts be kept separately, and that no rent or subdivisional interest be paid where a subdivision earned no surplus. It also ordered the preferential debts to be paid before rentals. The instalment of rent or interest on the Omaha Division due in April, 1885, not being paid, a bill was filed to foreclose the mortgage upon it, and when a default took place in the payments due in October, 1885, a receiver was asked for. In the following March a receiver was appointed as asked for, and the Omaha Division was surrendered to him by the general receivers of the Wabash system. He intervened in the Wabash suit, praying for payment by the general receivers of the overdue rent on the Omaha Division, amounting to $222,075.77. A decree of foreclosure and sale of the Wabash system, under the general mortgage, was entered, which reserved specially all rights under the Omaha Division, and under this decree a sale was made and the property was transferred to a new corporation called the Wabash Western Railway Company. The petition for the payment of rent of the Omaha Division, after reference to a master and report by him, resulted in a decree for the payment of one month's rent with interest, instead of sixteen months, as prayed for. *Held*, (1) That the court was bound to take into consideration the peculiar circumstances under which the receivers took possession of and operated the Wabash system; (2) That, following *Quincy, Missouri &c. Railroad* v. *Humphreys*, 145 U. S. 82, the court did not bind itself or its receivers to pay the agreed rent *eo instanti* by the mere act of taking possession, but that reasonable time had to be taken to ascertain the situation of affairs; (3) That the order made by the court below to pay the rents only after the discharge of the preferential debts was correct; (4) That the owners of the Omaha branch, or the trustees of its mortgage, knowing that that branch was in the hands of the general receivers, might have intervened in that suit for the protection of their property, and were bound by the order for payment of the preferential debts; as it is settled that whenever, in the course of a receivership, the court makes an order which the parties to the suit consider injurious to their interests, it is their duty to file a motion at once asking the court to cancel or to modify it; (5) That the petition of the receivers of March, 1885, and the order of the court thereupon touching subdivision earnings, was notice to the branch lines that they must not expect payment of their rent, when the subdivision earned nothing beyond operating expenses; (6) That as the mortgage to the United States Trust Company did not convey the income or earnings of the road to it, but only authorized it to take possession in case of default, the trustee could only secure the earnings by taking possession in such case; (7) That until the mortgagee asserted its rights under the mortgage to the possession of the road by filing a bill of foreclosure

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and by demanding possession, it had no right to receive the earnings and profits; (8) That the judgment of the court below, awarding a recovery of only one month's rent, was right. *United States Trust Co.* v. *Wabash Western Railway*, 287.

3. The general rule applicable to this class of cases is, that an assignee or receiver is not bound to adopt the contracts, accept the leases, or otherwise step into the shoes of his assignor, if, in his opinion, it would be unprofitable or undesirable to do so. *Ib.*
4. In such case a receiver is entitled to a reasonable time in which to elect whether he will adopt or repudiate such contracts. *Ib.*
5. If a receiver in a suit for foreclosing a railway mortgage elects to adopt a lease, he becomes vested with the title to the leasehold interest, and a priority of estate is thereby created between the lessor and the receiver, by which the latter becomes liable upon the covenant to pay rent. *Ib.*

See PUBLIC LAND, 1, 2, 3.

RECEIPT.

See PLEADING, 1.

RECEIVER.

See NATIONAL BANK;
RAILROAD, 2, 3, 4, 5.

RULE.

See COSTS.

SALARY.

1. The Supervising Architect of the Treasury is not entitled to extra compensation, above his salary, for planning and supervising the erection of a department building in Washington, occupied by other departments of the government. *Mullett* v. *United States*, 566.
2. In this case the delay in bringing suit leads to the conclusion that the architect recognized the work for which he sues as within the scope of his regular duties. *Ib.*
3. The payment to an Indian agent of the amount appropriated by Congress for the payment of his salary being less than the amount fixed by general law as the salary of the office, and his receipt of the sum paid "in full of my pay for services for the period herein expressed," is a full satisfaction of the claim. *Belknap* v. *United States*, 588.

See NATIONAL BANK, 2.

SALE ON EXECUTION.

By the laws of Colorado, title to land sold under execution remains in the judgment debtor till the deed is executed. *Turner* v. *Sawyer*, 578.

See ABATEMENT;
MINERAL LAND.

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SATISFACTION.

See SALARY, 3.

SERVICE OF PROCESS.

It is a sufficient service of a subpœna upon a foreign steamship company, which has within the district no officer, and no agent expressly authorized to accept service, to serve it upon its financial agent, at his office, at which the financial and monetary business of the company in this country is transacted, and which has been advertised by the company as its own office; although the docks of the company, where its steamships land and take and discharge cargo, and its office for the transaction of matters connected with its actual industrial operations in this country, are in another district. *In re Hohorst*, 653.

SPECIAL VERDICT.

When a special verdict is rendered, all the facts essential to entitle a party to a judgment must be found. *Ward* v. *Cochran*, 597.

SUPERVISING ARCHITECT OF THE TREASURY.

See SALARY, 1.

STATUTE.

A. CONSTRUCTION OF STATUTES.

1. While it is well settled that public grants are to be construed strictly as against the grantees, they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given. *United States* v. *Denver & Rio Grande Railway*, 1.
2. General legislation, offering advantages in the public lands to individuals or corporations as an inducement to the accomplishment of enterprises of a *quasi* public character through undeveloped public domain should receive a more liberal construction than is given to an ordinary private grant. *Ib.*
3. The construction placed by a state court upon one statute implies no obligation on its part to put the same construction upon a different statute, though the language of the two may be similar. *Wood* v. *Brady*, 18.

See JURISDICTION, E.

B. STATUTES OF THE UNITED STATES.

See ADMIRALTY, 3, 4;
ALASKA, 1;
CONSTITUTIONAL LAW;
CUSTOMS DUTIES, 1, 2, 3;
FEES, 1, 2;
JURISDICTION, A, 7 to 10, 11, 16, 18; C, 6, 7; D, 1, 2, 4, 5; E.
MINERAL LAND;
MORMON CHURCH;
NATIONAL BANK, 1, 2;
NEW TRIAL, 3;
PUBLIC LAND, 1, 2, 3, 4;
WITNESS, 2.

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C. STATUTES OF STATES AND TERRITORIES.

Arkansas.	*See* COURT AND JURY, 1.
Colorado.	*See* SALE ON EXECUTION.
Massachusetts.	*See* JURISDICTION, A, 12.
Montana.	*See* CONTRACT, 1.
Virginia.	*See* JURISDICTION, A, 21.

SUBROGATION.

See COMMON CARRIER, 1, 2.

TOWN-SITES.

See PUBLIC LAND, 4, 5.

TRADE-MARK.

1. A person cannot acquire a right to the exclusive use of the word "Columbia" as a trade-mark. *Columbia Mill Company* v. *Alcorn*, 460.
2. To acquire a right to the exclusive use of a name, device, or symbol as a trade-mark, it must appear that it was adopted for the purpose of identifying the origin or ownership of the article to which it is attached, or that such trade-mark points distinctively to the origin, manufacture, or ownership of the article on which it is stamped, and is designed to indicate the owner or producer of the commodity, and to distinguish it from like articles manufactured by others. *Ib.*
3. If a device, mark, or symbol is adopted or placed upon an article for the purpose of identifying its class, grade, style, or quality, or for any purpose other than a reference to or indication of its ownership, it cannot be sustained as a valid trade-mark. *Ib.*
4. The exclusive right to the use of a mark or device claimed as a trade-mark is founded on priority of appropriation, and it must appear that the claimant of it was the first to use or employ it on like articles of production. *Ib.*
5. A trade-mark cannot consist of words in common use as designating locality, section, or region of country. *Ib.*
6. In the case of an alleged violation of a valid trade-mark, the similarity of brands must be such as to mislead ordinary observers, in order to justify a restraining injunction. *Ib.*

TRUST.

See CORPORATION, 6, 7;
COTENANT;
PARTNERSHIP, 2.

VERDICT.

See SPECIAL VERDICT.

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WITNESS.

1. The question of excluding a witness, pending the testimony of other witnesses in a trial for murder, is within the discretion of the trial court; but if a witness disobeys the order of withdrawal, he is not thereby disqualified, but may be proceeded against for contempt, and his testimony is open to comment to the jury by reason of his conduct. *Holder* v. *United States*, 91.

2. Under the provisions in the act of March 16, 1878, 20 Stat. 30, c. 37, H. at the trial offered himself as a witness in his own behalf. In charging the jury the court said: "The defendant has gone upon the stand in this case and made his statement. You are to weigh its reasonableness, its probability, its consistency, and above all you consider it in the light of the other evidence, in the sight of the other facts. If he is contradicted by other reliable facts, that goes against him, goes against his evidence. You may explain it perhaps on the theory of an honest mistake or a case of forgetfulness, but if there is a conflict as to material facts between his statements and the statements of the other witnesses who are telling the truth, then you would have a contradiction that would weigh against the statements of the defendant as coming from such witnesses." *Held*, that this was error, as it tended to defeat the wise and humane provision of the law that "the person charged shall, at his own request, but not otherwise, be a *competent* witness." *Hicks* v. *United States*, 442.

3. An action to recover a penalty under that act, though in form a civil action, is unquestionably criminal in its nature, and the defendant cannot be compelled to be a witness against himself. *Lees* v. *United States*, 476.

WRIT OF ERROR.

See APPEAL.

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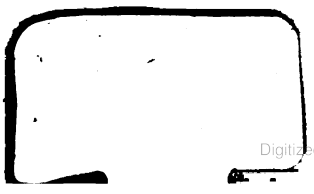
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